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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, *et al.*,
Petitioners,

v.

JOSEPH P. GALDA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW*

1. Does the First Amendment prohibit a state university from using mandatory but refundable student fees to support a neutral funding plan which, among other things, subsidizes a student organization of undisputed educational value that, in addition to apolitical activities, takes positions on some issues of public policy?

2. If such funding is impermissible, must the assessment of the mandatory fee be enjoined, or should the court of appeals have remanded the matter to the district court to consider other, less intrusive, remedies, such as placing the student fees in an escrow account of the type approved in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, ____ U.S. ____, 104 S.Ct. 1883 (1984)?

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*In addition to Rutgers, The State University of New Jersey, the petitioners are Dr. Edward J. Bloustein, Dr. Norman Reitman, Donald S. McNaughton, David A. Werblin, Katherine Elkus White, Donald M. Dickerson, Sanford M. Jaffee, Robert Kaplan, Edward Kramer, Linda Stamato, Robert J. Torricelli, Mary White Bell and Walter K. Gordon, all of whom were defendants in the district court and appellees in the court of appeals. In addition to Joseph P. Galda, the respondents are Paul Ewert, Kristina Farrow Cypel, Thomas H. Odom, Joseph Randall Corman, Lori Keeley, Leslie Beebe, Leonard Scott Kelter, Edward D. Wickham, and Christopher Lepre, all of whom were plaintiffs in the district court and appellants in the court of appeals. Intervenor New Jersey Public Interest Research Group, Inc., an appellee in the court of appeals, is also nominally a respondent on this petition, although it has been aligned with Rutgers as a defendant in this litigation and is filing its own petition for a writ of certiorari. There were no parties in the court of appeals other than those listed in this footnote.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the District Court for the District of New Jersey, granting defendants' motion for summary judgment, is reported at 516 F. Supp. 1142 (1981). The opinion of the Court of Appeals for the Third Circuit, reversing and remanding the case, is reported at 686 F.2d 159 (1982) and is reproduced in the separate Appendix to this petition at 45a-65a.

The opinion of the District Court for the District of New Jersey, entering final judgment in favor of defendants, is reported at 589 F. Supp. 479 (1984) and reproduced at 71a-104a. The opinion of the Court of Appeals for the Third Circuit, reversing, is reported at 772 F.2d 1060 and is contained in the Appendix at 1a-40a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on August 28, 1985. 67a-68a. On October 11, 1985, the Court of Appeals denied timely petitions for rehearing which had been filed by petitioners Rutgers, The State University of New Jersey, *et al.* ("Rutgers") and by New Jersey Public Interest Research Group, Inc. ("NJPIRG"). 69a-70a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This action was filed pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343 on September 4, 1979 by certain students then attending Camden College of Arts and Sciences, a component of defendant Rutgers. Plaintiffs contended that their First Amendment rights were violated by Rutgers' creation of a content-neutral funding mechanism for student groups that demonstrate both (i) significant educational value to the body of the University concerned with review of educational policy matters and (ii) student support. In particular, plaintiffs sought to bar funding through this mechanism of defendant NJPIRG,

an organization of undisputed educational value that engages in some advocacy on public issues.[1] Defendants now petition this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in plaintiffs' favor, a decision that is inconsistent with the trial court's findings of fact, the decisions of the Third Circuit itself, and the decisions of this Court.

The district court originally granted defendants' motion for summary judgment, finding that whatever infringement upon plaintiffs' constitutional rights resulted from the student fee in question was cured by the neutral funding mechanism's provision for a full refund upon demand. 516 F. Supp. 1142 (D.N.J. 1981). Upon appeal, the Third Circuit, in a unanimous panel opinion ("*Galda I*") authored by Judge Adams (who later dissented from the decision that is the subject of this petition), held that, at least on the undisputed facts before it, the availability of a refund did not immunize the funding mechanism from constitutional challenge. The Third Circuit thus reversed and remanded the case for trial under the following principles:

> Although many student-related groups have ideological overtones, to the extent that the university determines that an organization is an appropriate participant in the total university forum, considerable deference should be accorded that judgment. This deference stems from the long-standing recognition that the university as a whole functions as a forum for the exchange of

[1]There is no dispute that NJPIRG is a non-partisan organization. 4a, 12a-13a, 25a n.4.

diverse views. As the Supreme Court has observed, "[t]he college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.' " *Healy v. James,* 408 U.S. 169, 180 (1972); *Widmar v. Vincent* [454 U.S. 263], 102 S. Ct. 269, 273 n.5 (1981). The holdings in *Veed* [*v. Schwartzkopf,* 353 F. Supp. 149 (D. Neb.), *aff'd mem.,* 478 F.2d 1407 (8th Cir. 1973), *cert. denied,* 414 U.S. 1135 (1974)] and *Arrington* [*v. Taylor,* 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd mem.,* 526 F.2d 587 (4th Cir. 1975)] thus correctly indicate that the university has broad latitude in providing an opportunity for students to participate in – and to oppose – the expression of a broad spectrum of ideology.

To overcome the presumptive validity of the university's judgment that an organization contributes to the university community and to make out a prima facie case that exaction of the fee conflicts with the mandates of the first amendment, persons objecting to the fee must establish that the challenged group functions essentially as a political action group with only an incidental educational component. At that point the burden of producing evidence to counter the plaintiffs' showing or to otherwise demonstrate a compelling state interest shifts to the university. We do not rule out the possibility that, even in the face of an unrebutted prima facie showing, the university might demonstrate a compelling state interest by establishing the importance of the challenged group's contribution to the university forum.

59a-60a.

Following a ten-day bench trial in January and February of 1984, at which 36 witnesses testified, the district

court filed detailed and extensive findings of fact and conclusions of law in accordance with the standard enunciated in *Galda I.* 71a-104a. The district court entered judgment for defendants on the ground that the plaintiffs had "failed to overcome the presumptive validity of the University's judgment [that the neutral funding system and its application to NJPIRG have substantial, and not incidental, educational value] and have thus failed to make out a prima facie case that their constitutional rights have been violated." 104a. The following is a synopsis of relevant portions of the district court's findings of fact:

1. The majority of student organizations at Rutgers are funded through a mandatory, non-refundable student fee collected by the university as part of each term's bill. 76a. The funds generated by the fee are apportioned on each campus of the University by a small committee of students. Each student committee determines which student groups on its campus will be subsidized. In practice, the fee subsidizes different groups on each campus, including student groups that take positions on political and social issues, such as the American Civil Liberties Union, the Jewish Awareness Club, the National Association for the Advancement of Colored People, and the Gay Alliance. 76a-77a.

2. In 1972, Rutgers determined to and did establish a content-neutral alternative funding mechanism for student groups that could establish significant educational value and broad student support on a particular campus. A copy of that policy, as amended in 1973, is contained in the Appendix at 105a. Money is generated by a mandatory but refundable student fee. Educational value is determined by the University President and the University Senate, a pre-existing advisory body on educational policy composed of administrators, faculty, and students who review a

concept plan submitted by the student group seeking funding. 79a. Student support is established through student-run referenda. *Id.* Unlike the general student fee, the fee collected pursuant to the alternative neutral funding mechanism is refundable upon request. The procedure of concept plan approval and referenda is repeated every three years for any group that desires continued funding. 105a. Two organizations have taken advantage of this neutral funding policy: *The Daily Targum*, the undergraduate newspaper of the New Brunswick campus, and NJPIRG, the particular organization at issue here. 81a. Rutgers' purpose in creating this policy was to provide valuable educational opportunities to Rutgers' students through the creation of a forum for the expression of diverse student viewpoints, access to which was not controlled by the committee on each campus. 76a-81a.

3. NJPIRG is a student organization that has obtained funding on some of Rutgers' campuses from 1972 to the present pursuant to the neutral funding mechanism. 80a. It engages in a wide spectrum of apolitical and some "political" activities. 85a-88a. NJPIRG's single largest project – stream-walking to check for signs of pollution – constituting 40 percent of NJPIRG's activities (86a), is admittedly apolitical. NJPIRG also sponsors public fora, debates, and lectures on various issues, including those relevant to education and tuition matters of direct interest to Rutgers students. *Id.* Students have also researched, written, and disseminated pamphlets and guides for student use on such topics as the transportation system at the New Brunswick campus of Rutgers and banking and garage services available locally. *Id.*

4. NJPIRG has provided internships for hundreds of Rutgers students. 84a-85a, 88a-95a. In order to obtain credit for an internship, a student contacts a faculty

member, describes the proposed project, and obtains the faculty member's commitment to supervise it and award credit. 85a. It is entirely up to the faculty member to decide whether to give approval to a particular project and, if so, whether requirements will be imposed on the interns which go beyond those set by NJPIRG. *Id.* "PIRG staff members meet with PIRG interns on at least a weekly basis and provide faculty members with evaluations of the students' work at PIRG," but it is the faculty member who assigns the grade. 85a. Rutgers grants credit for non-NJPIRG internships as well, but most of the faculty members who testified "felt that PIRG internships are superior to other available internships, primarily because of PIRG's excellent supervision of student interns, because PIRG is on-campus and accessible to both faculty and students and because PIRG is an organization that works on issues of particular interest to students." 102a.

5. Any student at Rutgers, whether or not active in NJPIRG, may submit suggested projects for the consideration of NJPIRG's Board of Directors. 83a. The projects and positions of NJPIRG are selected annually by the students governing the organization. *Id.* An executive director is hired by the student board of directors to oversee the organization's activities on a day-to-day basis, and employees of NJPIRG advise the students and assist in the development and execution of projects, but staff members do not serve on the Board of Directors. 83a-84a.

6. Some students who become involved in NJPIRG do so for the opportunity to engage in non-partisan analysis, study, and advocacy on various public policy issues. However, the unrebutted testimony of Rutgers officials, based on contemporaneous documentation, established that Rutgers included NJPIRG in the neutral funding plan for its educational benefits. 76a-80a, 99a-100a. Moreover,

the unrebutted testimony of Rutgers faculty members, as well as overwhelming evidence from Rutgers students and from administrators from Rutgers and other renowned universities, established that NJPIRG offered and continues to offer substantial educational benefits. 88a-95a, 96a-103a. The district court thus found that "PIRG has a very substantial educational component, and that its presence at Rutgers significantly enhances the educational opportunities available for students at that institution." 102a-103a.

The factual findings of the district court in support of its judgment in favor of defendants are binding upon an appellate court unless found to be clearly erroneous. *See Anderson v. City of Bessemer City,* ____ U.S. ____, 105 S. Ct. 1504 (1985).

Plaintiffs appealed the judgment of the district court and on August 28, 1985, a panel comprised of Judges Weis and Wisdom, with Judge Adams dissenting, reversed and entered judgment in plaintiffs' favor (*Galda II*). Whereas the *Galda I* court recognized that a university's judgment in creating an educational forum can withstand constitutional challenge so long as a participating group, even if politically oriented, has an educational function, the *Galda II* panel ignored the district court's findings as to the educational contributions of NJPIRG and instead focused on the motives of some students who participate in NJPIRG. In so doing, the panel rejected the district court's factual findings without any determination that those findings were clearly erroneous. The panel conceded that "PIRG is politically non-partisan" and that "the training PIRG members may receive is considerable," but nonetheless characterized NJPIRG's objectives as "frankly ideological." 4a, 13a. According to the *Galda II* panel,

because students may work on NJPIRG internships with ideological goals in mind, NJPIRG's subtantial educational function is still "incidental"; that is, the educational function arises from or accompanies ideological goals. 13a. The panel further characterized NJPIRG as an outside organization independent of Rutgers and held that, when such a group participated in the university forum, no compelling state interest in balanced exposure to ideas would legitimize mandatory funding. 16a. The *Galda II* majority reversed and remanded for entry of an order enjoining the assessment of the mandatory fee paid to NJPIRG. 18a.

Judge Adams, the author of the *Galda I* opinion, dissented from the opinion in *Galda II*. Judge Adams indicated that the *Galda II* majority had misconstrued the *Galda I* standard by focusing on the objectives of NJPIRG which, according to the majority, by definition are ideological. The majority thus

> sidestep[ped] the second part of the *Galda I* prima facie inquiry by finding that the group's "political" objectives effectively negate its educational component. It [held] that where a group's objectives are primarily political, the extent of the group's educational benefits to the university community is immaterial.

30a. Judge Adams also noted the majority's rejection of *Galda I*'s requirement that judicial deference be accorded the university's judgment that a political group contributes to the university forum. 24a-27a. Judge Adams further observed that the majority's holding, while designed to further First Amendment interests, would actually frustrate them by requiring public universities to exclude certain student groups from open forums solely because of the positions taken by the groups:

> The majority's result . . . would effectively inhibit political speech under the rubric of the First Amendment. . . . I would hold that where a state university establishes an educational equal access forum funded by student fees, it does not impermissibly violate the objecting students' First Amendment rights by directing their fees to particular groups, so long as it grants access to the funding mechanism on educational and equal access grounds.

38a.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW CONCERNING THE RIGHT OF A STATE UNIVERSITY TO CONTROL THE MANNER IN WHICH ITS STUDENTS ARE EDUCATED, QUESTIONS THAT WERE DECIDED BY THE COURT OF APPEALS IN A MANNER IRRECONCILABLE WITH *WIDMAR V. VINCENT*, 454 U.S. 263 (1981), *ABOOD V. DETROIT BOARD OF EDUCATION*, 431 U.S. 209 (1979), AND OTHER PERTINENT DECISIONS OF THIS COURT.

The irreconcilable differences between the *Galda II* opinion and the decisions of this Court — differences that cannot be overemphasized — are most apparent in three areas. First, the *Galda II* opinion focuses on the motives of the students who join a challenged organization rather than on the educational judgments made by the university when creating a forum for expression. In so doing, the *Galda II* opinion could be applied in such a way as to support the withdrawal of student fee funding from numerous student groups at Rutgers and other state universities and colleges because students are attracted to the groups by the opportunity to deal with public policy questions. Secondly, the *Galda II* opinion ignores the First Amendment

rights of non-objecting students by requiring Rutgers to exclude student groups from a public forum on the basis of the content of their speech. Not only is such an exclusion unconstitutional, but Rutgers is forced to make quasi-judicial decisions as to what constitutes ideological speech instead of making those judgments which it is uniquely qualified to make: *i.e.*, whether a group has a significant educational function. Finally, *Galda II* does not address the issue of the refundability of the fee paid to support the neutral funding system. Thus, by enjoining the assessment of a mandatory fee, the *Galda II* court overlooked other, less intrusive, remedies.

A. *Galda II* Is Inconsistent With the Decisions of This Court Which Examine a University's Motives in Establishing a Public Forum Rather Than the Motives of the Forum's Participants.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court made clear that the constitutionality of a student group's inclusion in a public university forum depends on the university's motives for creating the forum rather than the goals of the student group. In *Widmar*, students sought access to university facilities supported by a mandatory student fee in order to hold religious meetings and otherwise advance their religious objectives. The students pointed out that other, non-religious, student groups already were permitted such access. The university refused to permit access to the student religious group, however, fearing that it might thus violate the anti-establishment clause of the First Amendment. Despite the religious objectives of the group's members, this Court nevertheless permitted it to use the university facilities. The Court recognized that the university promoted a secular purpose

– *i.e.*, the exchange of diverse views by students – in adopting an open-forum policy and in allowing a religious group to take advantage of it on the same terms as other groups. 454 U.S. at 271. Although it happened that a religious group would benefit from such a policy, the religious benefits were "incidental" to the secular purpose underlying the policy adopted by the university and applied to all groups. *See also Mueller v. Allen,* 463 U.S. 388, 394-95 (1983) (there is a secular purpose for tax deductions allowed for school expenses, even though the statute benefits the parents of children attending parochial schools).

Under the analysis employed by this Court in *Widmar,* then, when the motives of a university in using mandatory student fees to operate an open forum are content-neutral, the objectives of a student group participating in that forum are of no consequence in determining whether the constitutional rights of other students have been infringed. Such an analysis recognizes the deference that is due to a university's judgment in creating such a forum in the first place. *See, e.g.*, 59a-60a (*Galda I*).

The educational motives of Rutgers in establishing the funding policy at issue here could not be clearer. As the district court specifically found, Rutgers sought to create valuable educational opportunities for Rutgers students through the creation of a forum for the expression of diverse student views. 78a, 99a-100a. The *Galda II* panel ignored the legitimate motives of Rutgers, however, and focused instead on what it perceived as the ideological objectives of NJPIRG. Such an analysis is not only inconsistent with *Widmar* and with the deference that is due a university's educational judgments, it also could lead to the withdrawal of funding from any student group whose members may be motivated by ideological concerns.

The *Galda II* majority attempted to distinguish NJPIRG from other student groups by characterizing it as an "outside organization independent of a university." 16a. In so doing, however, the *Galda II* panel ignored the factual findings of the district court to the contrary. Moreover, the majority failed to recognize that, as Judge Adams noted in his dissent, numerous student groups, such as the ACLU and NAACP, do not in fact operate "inside" a university and under its control. 26a-27a n.5. Since there is no meaningful distinction between NJPIRG and a substantial number of student groups whose members are interested in public policy issues, an analysis that focuses on the motives of students rather than the motives of the university endangers the funding of many long-established student groups. Such a threat, while surely unintended by the *Galda II* majority, could be the unfortunate result of the *Galda II* court's failure to follow *Widmar v. Vincent*.

B. *Galda II* Is Inconsistent With the Decisions of This Court Prohibiting the Exclusion of Student Groups From a Public Forum on the Basis of the Content of Their Speech, Absent a Compelling Justification.

Universities provide forums for the exchange of ideas. As participants in these forums, students constantly exchange the roles of speaker and audience, each role imbued with interests of constitutional proportions. To fulfill its role properly, the university must respect those sometimes competing interests by providing access in such a way that the legitimate and compelling purpose of the forum — education — is enhanced by directing resources to activities with substantial educational value, while being careful to minimize its censorship of the content of the speech engaged in by students and faculty, whether inside or outside the classroom.

Under *Galda II,* however, a university may not allow, as part of a neutral funding policy, student fees to be used to fund organizations whose student members wish to take a stand on issues of public policy, even when those students who object have a right to the refund of their fees. Such a restriction places a university in the difficult position of regulating access to its student-subsidized forum on the basis of the political or ideological content of speech. This Court has already held, however, that it is constitutionally impermissible to bar access to a student-supported forum according to content-based criteria. Specifically, in *Widmar v. Vincent,* this Court held that, once a university has established an open forum, it cannot bar a student group from participating in that forum because of the content of its speech. Once the student group qualifies for inclusion in the forum under content-neutral criteria, the objections of opposing student groups lose any constitutional validity. Thus, in *Widmar* this Court observed:

> The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James,* 408 U.S. 169 (1972).[13] In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

454 U.S. at 273. Footnote 13 referred to in the above quotation states in applicable part:

> [13]This case is different from case in which religious groups claim that the denial of facilities *not* available to other groups deprives them of

> their rights under the Free Exercise Clause. Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and *it is on the bases of speech and association rights that we decide the case.*

Id. (second emphasis added). This Court thus ruled that the university's content-based regulations must fall and the student religious group must be permitted use of the student fee-supported facilities:

> Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. [Citations omitted]. In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. [Citation omitted].

Id. at 269-70.

Just as the students in *Widmar* had a First Amendment right to have their religious speech heard in the university's open forum, so do those students who wish to participate in educationally valuable "political" speech through NJPIRG have a First Amendment right of access to the Rutgers forum. *See Consolidated Edison Co. v.*

Public Service Comm'n, 447 U.S. 530 (1980); *Mills v. Alabama*, 384 U.S. 214 (1966); and other authorities cited by Judge Adams at 27a [illegible]utgers is free to exclude NJPIRG or any other group which meets the conditions stated in the policy only if there is a compelling justification for content-based discrimination. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). Since the district court found no such compelling justification, the *Galda II* opinion is irreconcilable with the constitutional precedents of this Court.

As a result of the *Galda II* panel's failure to consider the First Amendment interests of those students who do not object to NJPIRG's inclusion in the Rutgers forum, Rutgers and other public colleges and universities now must, before allowing a student group to be subsidized by mandatory student fees, attempt to predict what a court will decide if it is later alleged that the group has ideological objectives. A university is ill-equipped, however, to assume the task of separating ideological from non-ideological groups. It is a task that even exasperated the *Galda II* majority. 14a. Recognizing that such an exercise is cumbersome as well as unconstitutional, the *Galda I* court instead crafted a test that was both content-neutral and well within the expertise of a university: *i.e.*, whether a challenged student group has an educational component that is more than merely incidental. The *Galda I* test is consistent with this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), to the effect that the compelled subsidy of political or ideological speech violates the First Amendment only when that speech is substantially unrelated to an important, constitutionally recognized purpose of the organization compelling the subsidy. In *Abood* that purpose was collective bargaining.

Here the goal is maintaining the academic freedom necessary to permit the educators at our state universities to fulfill their crucial educational role in our society free of outside interference. *See Minnesota State Board For Community Colleges v. Knight,* 465 U.S. 271, 294 (1984) (Marshall, J., concurring in judgment); *Regents of the University of California v. Bakke,* 438 U.S. 265, 312 (1978) (opinion of Powell, J.). Not only is the *Galda I* test consistent with *Abood,* but it is based on this Court's decision in *Widmar v. Vincent,* which focused on the motives of a university in creating a public forum. The *Galda I* court understood that a public organization, such as a university, is peculiarly well-equipped to make funding decisions on the basis of criteria that are central to that organization's goals. When a university is forced to use other criteria, such as whether a group is ideological, it is driven into a constitutional thicket from which it may not be able to escape. Unfortunately, the *Galda II* court ignored both the practical and constitutional implications of *Abood, Widmar,* and *Galda I,* with with the result that universities such as Rutgers are now required to assume the quasi-judicial role of distinguishing ideological from non-ideological speech.

C. *Galda II* Is Inconsistent With the Decisions of This Court Which Examine When and How a Fee Is Refundable When Determining Whether a Fee Has Been Assessed Unconstitutionally.

In the recent decision of *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* ____ U.S. ____, 104 S. Ct. 1883 (1984), this Court reaffirmed that when and how a mandatory fee is refundable is relevant to the inquiry of whether that fee has been assessed in violation of

the First Amendment. In *Ellis,* members of a union objected on First Amendment and statutory grounds to several of the union's uses of their mandatory dues. This Court noted that a pure rebate – *i.e.,* a refund of dues after those dues had been exacted and used – would be insufficient to cure any violation. *Id.* at 1890. This Court further observed, however, that a refund of the dues after placement in an interest-bearing escrow account was a constitutionally permissible remedy. *Id.* This is because the constitutional interest at stake is not the assessment of the fee in the first place but the use of the dues to support certain ideological activities to which objection is made. *Id.*

The *Ellis* decision guided the Third Circuit in *Robinson v. State of New Jersey,* 741 F.2d 598 (3d Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1228 (1985), which involved similar claims by members of a different union. The *Robinson* court acknowledged that "a temporary loss of funds does not have the same impact on constitutionally protected speech that the denial of a forum or the forcible contribution to a political cause against one's will would have." 741 F.2d at 611. Since the dues in *Robinson* incorporated both an escrow account refund as well as other remedies approved by this Court in *Ellis,* there was no need to enjoin the assessment of the dues. *Id.* at 612-14.

In issuing a blanket injunction against the assessment of those neutral funding fees used to subsidize NJPIRG, the *Galda II* majority never even addressed the issue of when and how the mandatory fees could be refunded without constitutional injury: for example, whether a portion of the NJPIRG fees collected in a given semester could be placed in an interest-bearing escrow account and then refunded with interest upon the request of students. The majority apparently assumed that plaintiffs' First Amendment rights were violated by the *assessment* of the fee,

rather than by NJPIRG's *use* of the fees prior to their refund. Such an assumption clearly contradicts this Court's decision in *Ellis*.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1985

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, *et al.*,
Petitioners,

v.

JOSEPH P. GALDA, *et al.*,
Respondents.

NEW JERSEY PUBLIC INTEREST RESEARCH GROUP, INC.,
Petitioner,

v.

JOSEPH P. GALDA, *et al.*,
Respondents.

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5498

JOSEPH P. GALDA, PAUL EWERT, KRISTINA FARROW CYPEL, THOMAS H. ODOM, JOSEPH RANDALL CORMAN, LORI KEELEY, LESLIE BEEBE, LEONARD SCOTT KELTER, EDWARD D. WICKHAM, and CHRISTOPHER LEPRE, Individually, and upon behalf of all others similarly situated,

Appellants

v.

RUTGERS, The State University of New Jersey, DR. EDWARD J. BLOUSTEIN, Individually, and as President of Rutgers, The State University of New Jersey, DR. NORMAN REITMAN, Individually, and as Chairman of the Board of Governors of Rutgers, The State University of New Jersey, DONALD S. MACNAUGHTON, DAVID A. WERBLIN, KATHERINE ELKUS WHITE, DONALD M. DICKERSON, SANFORD M. JAFFE, ROBERT KAPLAN, EDWARD KRAMER, LINDA STAMATO, ROBERT J. TORRICELLI, MARY WHITE BELL, as members of the Board of Governors of Rutgers, The State University of New Jersey, and WALTER K. GORDON, Individually and as Dean of Rutgers Camden College of Arts and Sciences

The New Jersey Public Interest Research Group, Inc.,

Intervenor

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

(D.C. Civil No. 79-2811)

Argued February 26, 1985

Before: ADAMS, WEIS, and WISDOM,*
Circuit Judges

Filed August 28, 1985

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* The Honorable John Minor Wisdom, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

OPINION OF THE COURT

WEIS, *Circuit Judge.*

The plaintiff students contend that a mandatory fee imposed on them by a university for the specific purpose of supporting an independent organization whose aims they oppose is an infringement on their First Amendment rights. The district court held that the funding procedure was permissible because the outside organization contributed to the education of its student members. We conclude that because the educational component is only incidental to the organization's ideological objectives, the educational benefits are not adequate to overcome the constitutional objections. Consequently, we will vacate the district court's judgment and direct that collection of the mandatory fee be enjoined.

In an earlier appeal in this litigation we reversed a summary judgment in favor of defendants. *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982) (*Galda I*). On remand, the district court held a two week bench trial. After filing extensive findings of fact and conclusions of law, the court entered judgment for the defendants. *Galda v. Rutgers*, 589 F. Supp. 479 (D.N.J. 1984).

This suit for injunctive relief was brought under 42 U.S.C. § 1983 by current and former students at Rutgers Camden College of Arts and Sciences, a unit of Rutgers, the State University of New Jersey. Plaintiffs asserted that their First Amendment rights were violated by the University's imposition of a mandatory, refundable fee for the specific purpose of supporting the New Jersey Public Interest Research Group (PIRG).

The New Jersey PIRG has members at a number of other college campuses in New Jersey. It is an independent, non-profit corporation, controlled by a board of student representatives at the state-wide level.

It maintains a paid staff consisting of a director, one part-time and six full-time employees.

PIRG is politically nonpartisan, but participates in state legislative matters and actively engages in research, lobbying and advocacy for social change. Its staff and student members have lobbied for a federal student assistance act, the Equal Rights Amendment, a nuclear weapons freeze, and the enactment of the Pine Lands Preservation Act. PIRG also opposed the construction of the Tocks Island Dam on the Delaware River.

In addition, members of the organization drafted proposed legislation mandating a study of energy production in New Jersey and testified in opposition to an increase in utility rates before an administrative agency. PIRG members have researched and published documents on a number of other consumer and environmental issues. The organization also provides internships for students who receive academic credit for the work they perform.[1]

Because PIRG is an organization independent of the University, it is ineligible to receive money from the general student activities fee. It has, however, qualified for financial support under the Rutgers "neutral funding policy." To do so PIRG was required to submit a "concept plan" to the University outlining the organization's educational value. Following administration approval, the next step was to participate in an election where PIRG was required to obtain the vote of at least 25% plus one of the student body on a particular campus. The neutral funding

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1. PIRG's concerns include environmental preservation efforts, consumer protection, womens rights, tenants rights, tuition policies, and energy conservation. Assisted by several Rutgers law students, PIRG's staff attorney has at various times represented it in litigation connected with these programs.

policy also requires that the votes must represent a majority of the ballots actually cast.

PIRG's concept plan has received the University's approval in each of the three-year periods in which it was submitted, and it has been successful in securing the necessary affirmative votes in most of the student referenda.

As a result of PIRG's qualification under the Rutgers' funding procedures, each student enrolled at a particular campus must pay a mandatory fee of $3.50 to PIRG. In a twelve year period, the organization received more than $800,000 in this fashion and currently receives over $100,000 per year from the mandatory assessment. A student who does not wish to support PIRG is required to request a refund, which is generally returned several months later.

In the first proceeding, without exploring the plaintiffs' contentions, the district court granted summary judgment for defendants, holding that since the fee was refundable, there had been no constitutional infringement. *Galda v. Bloustein*, 516 F. Supp. 1142 (D.N.J. 1981). On appeal from that ruling, we held that the refund provision was not adequate and on that record even a temporary exaction of the PIRG fee from plaintiffs could not be justified. *Galda I*, 686 F.2d at 169. We remanded because there was a genuine issue of material fact on whether assessment of the fee infringed the plaintiffs' constitutional rights.

At trial PIRG's organizational structure was developed in some detail. In essence, the court found that the group's policies were made by the state board of student directors, which also had the authority to hire and discharge the salaried executive director. In addition to an executive director, PIRG hires a paid staff that manages the day-to-day operations of the organization.

Plaintiffs produced three expert witnesses who testified that PIRG operates as a political action group and its purpose is to "pursue change in the political process." One expert opined that PIRG "consistently represents and adheres to a liberal ideology and views American society as covertly oppressive." Another of the plaintiffs' experts conceded that he "could not quantify PIRG's political and non-political activities" and that many of its projects were non-ideological.

Defendants produced four experts, including the President of Rutgers, who testified to what they believed were the educational benefits to the students participating in PIRG. These included "learning to advocate and thoroughly learning their adversary's position in order to rebut them", forcing students to "publicly campaign and promote an organization", providing an opportunity "to investigate, research, write, and advocate their positions before governmental agencies," providing "students with leadership opportunities," and "teaching students to function as citizens." 589 F. Supp. at 493-94.

A number of faculty members as well as current and former students testified about their participation in PIRG activities. The students noted that their experiences included public speaking, learning the use of a law library, and developing interest in a public service, governmental career which some followed after graduation. The faculty members talked favorably about the opportunity for, and close supervision of, internships.

One faculty member spoke especially about the "stream walking" phase of the environmental project for clean streams. In this activity, participants walked along water courses in search of illegal polluters who were then reported to the Environmental Protection Agency. The court found this to be a major activity. Faculty members testified that the stream walking

program was valuable because of the students' opportunity to learn about the environment and governmental process.

The defense witnesses did not dispute that PIRG took positions on political as well as ideological issues and worked actively to advance them. An examination of PIRG's financial documents by a certified public accountant as well as an independent review by the district court established that it was not possible to "numerically quantify 'political' and 'educational' components of PIRG."

The district court found that Rutgers "has made a carefully reasoned decision that PIRG is a valuable educational adjunct to the more traditional classroom activities." PIRG had "engaged in projects that can be objectively characterized as both 'educational' and 'political.' Because of the fact that some activities ostensibly political are also inherently educational, it is impossible to neatly quantify PIRG's activities into these simplistic categories." 589 F. Supp. at 495.

In passing on the experts' testimony, the court stated that to the extent the parties differ "about the nature of PIRG and its contributions to the university community, the court finds there exists some difference of opinion in the academic community." But, the court concluded, "PIRG has a very substantial educational component, and its presence at Rutgers significantly enhances the educational opportunities available for students at that institution." The court therefore found that "plaintiffs have failed to overcome the presumptive validity of the University's judgment and have thus failed to make out a prima facie case that their constitutional rights have been violated." Accordingly, judgment was entered for defendants.

Preliminarily, it is helpful to briefly review the nature of the constitutional right at stake. Plaintiffs assert that they may not be compelled to contribute to

an organization which espouses and promotes ideological causes they oppose. The contours of this right are still in the developmental stage. Frequently cited as the seminal case is *Board of Education v. Barnette*, 319 U.S. 624 (1943), where the Court recognized an individual's right to refuse on religious grounds to participate in the traditional flag salute. The Court described the right as freedom from "a compulsion of students to declare a belief."

The *Barnette* rationale was extended to the forced payment of "union shop" or "agency shop" fees, portions of which were used for purposes not germane to collective bargaining activities. Those decisions beginning with *International Association of Machinists v. Street*, 367 U.S. 740 (1961), progressed through *Railway Clerks v. Allan*, 373 U.S. 113 (1963), to *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

In *Abood*, the Court found "meritorious" the argument that employees "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representatives." *Id.* at 234. More recently in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 52 U.S.L.W. 4499 (April 25, 1984), without discussing the constitutional principle, the Court devoted its attention solely to developing a proper remedy for the violation of the First Amendment right not to support an ideological view the person opposes.

In another context, the Court has recognized the right of an individual to reject a state measure that forces him, "as a part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). *See*

also Zauderer v. Office of Disciplinary Counsel, 53 U.S.L.W. 4587, 4594 (May 28, 1985).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that contributing to a political message is protected by the First Amendment. *See also Federal Election Comm'n. v. National Conservative Political Action Committee*, 53 U.S.L.W. 4293 (March 18, 1985). Commenting on *Buckley*, the Court in *Abood* observed that compelling, as well as prohibiting, "contributions for political purposes works no less an infringement" on constitutional rights. 431 U.S. at 234.

Significantly, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), a First Amendment controversy, the Court drew no subject matter distinction between partisan political topics and those of general public concern.

In short, what *Abood* holds objectionable is the "compulsory subsidization of ideological activity" by those who object to it. 431 U.S. at 237. Commentators have debated the basis supporting this right. It may be a broad concept of "individual freedom of mind." *Wooley v. Maynard*, 430 U.S. at 714, or a ban on coerced affirmation of distasteful views, or a right not to be subjected to a limitation on freedom of conscience, or perhaps a right to maintain silence in the face of a governmental pronouncement.[2] We resist the temptation to expound on these absorbing theories because whatever the source or underlying rationale, the Supreme Court's precedents establish to our satisfaction that plaintiffs have presented a valid constitutional interest for consideration.

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2. *See, e.g.*, Gaebler, First Amendment Protection Against Government Compelled Expression and Association, 23 B.C.L. Rev. 995 (1982); Cantor, Forced Payments to Service Institutions and Constitutional Interests In Ideological Non-Assocation, 36 Rutgers L. Rev. 1 (1983).

Although the jurisprudential underpinnings for the constitutional right are complex, the issue here is a narrow one and may perhaps best be explained by eliminating what is not at stake. This case does not address the problem presented by a state university's allocation of a mandatory non-refundable student activity fee. We are not concerned here with the question whether an organization with PIRG's philosophic outlook may be funded through the general activities fund as are other campus organizations representing diverse views.

In short, we do not enter the controversy on whether a given campus organization may participate in the general activities fee despite the objections of some who are required to contribute to that fund. *See, e.g., Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983); *Maryland Public Interest Research Group v. Elkins*, 565 F.2d 864 (4th Cir. 1977). *See also* Note, "Fee Speech:" First Amendment Limitations on Student Fee Expenditures, 20 Cal. W.L. Rev. 279 (1984).

And, although we are reluctant to belabor the obvious, it apparently must be made absolutely clear that in no way does this case present the issue of whether PIRG or any other organization may be restricted in the expression of its views on campus or elsewhere. Nor does this case in any way question PIRG's right to finance its operations by voluntary contributions from those who agree with its objectives.

As *Galda I* emphasized, there is a distinction between PIRG and student organizations that are funded through the student activity fee. We noted that the student activity fee is used to subsidize a variety of student groups, and therefore that assessment can be "perceived broadly as providing a 'forum' for a diverse range of opinion." In contrast, "PIRG does not provide a forum for the expression of differing views" but is a "group." *Id.* at 166. Moreover, the PIRG fee is

segregated from other charges listed on the students' bills and supports only that "group."

The question here is limited to whether a state university may compel students to pay a specified sum, albeit refundable, to an independent outside organization that espouses and actively promotes a political and ideological philosophy which they oppose and do not wish to support.

In *Galda I*, we noted that "considerable deference" should be accorded the university's judgment that the organization was "an appropriate participant in the total university forum." In order to "overcome the presumptive validity of the university's judgment and to make out a prima facie case that exaction of the fee conflicts with the mandate of First Amendment," plaintiffs must establish that PIRG "functions essentially as a political action group with only an incidental educational component." *Id.* at 166. In addition, we stated that the university is free to "counter the plaintiff's showing or to otherwise demonstrate a compelling state interest by establishing the importance of the challenged group's contribution to the university forum." *Id.* at 166-167.

In speaking of a prima facie case, *Galda I* referred to the "exaction of the fee", referring to the mandatory assessment of the payment to PIRG. The elements of compulsion and payment to an outside organization with which the plaintiffs disagree are the significant factors that trigger the inquiry in this case.[3] Whether the compulsion occurred through unilateral decision of university officials or only after the vote of a majority of the students does not diminish the infringement on the plaintiffs' right to withhold their support to an organization whose aims they find repugnant.

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3. These factors distinguish the situation where the challenged group is part of the university community and is funded through the student activity fee.

At trial plaintiffs presented evidence that PIRG, in at least some, if not a majority, of its activities is an entity devoted to political and ideological objectives. Defendants did not dispute that fact, but instead focused on the educational benefits associated with participation in the PIRG program. As noted earlier, these include observing governmental agencies in action, public speaking, research, leadership development, and other factors which may ordinarily be obtained from the "hands-on" training common to any large organization and particularly one that has some contacts with government.

The educational advantages described in the testimony do not differ from those that might be obtained by working with, or for, an independent organization such as the Republican or Democratic Party, or a clearly religious group which has undertaken an active and vigorous proselytizing program. As we have said, "it could not be seriously contended that student fees could be funnelled to such a group." 686 F.2d at 166. Yet, the educational component that the University presents here as justification would be precisely the same were the recipient group one that clearly could not receive affirmative state support.

PIRG's efforts are primarily devoted to changing conditions outside the University. For example, its interest in environmental and energy concerns focuses on state-wide or national issues. Similar in scope is its commitment to enactment of an equal rights amendment, reform of tenants rights, and a nuclear weapons freeze. While such matters may affect the general public, those causes are not particularly germane to students of the University qua students.

Although such issues as educational loans and consumer protection reports on businesses near campus may come closer to direct student interests,

they do not minimize the group's activities of a broader scope. In this respect, PIRG's programs and purposes are quite unlike a service organization, such as a bar association, which in the course of promoting the specialized interests of the group may at times take positions opposed by various members. *See Lathrop v. Donohue*, 367 U.S. 820 (1961).

Although the training PIRG members may receive is considerable, there can be no doubt that it is secondary to PIRG's stated objectives of a frankly ideological bent. To that extent the educational benefits are only "incidental" -- arising from or accompanying the principal objectives -- and subordinate to the group's function of promoting its political and ideological aims.

It is not quantity that determines whether the benefit is incidental in circumstances such as these. That assessment is made by examining the nature of the group and its primary function. *Galda I* made that point in noting that in the procedural posture of the case, the court had to assume "at least one of PIRG's functions is purely political, and non-educational in nature." 686 F.2d at 164-65. The district court in reciting PIRG's history stated, "Under the students' proposal, PIRG was to be a non-partisan, non-profit corporation which would research and lobby for social change." 589 F.Supp. at 483. Those functions have continued to be PIRG's raison d'etre as a review of its programs and activities confirms.

The experience gained from lobbying activities as well as advocacy, leadership, public speaking, and research might just as readily be obtained by membership in the University sponsored Legislative Action Committee, by participation in internships in various governmental agencies also available to Rutgers students, and through the work of other campus organizations.

Moreover, it must be recognized that because the plaintiffs are opposed to PIRG's ideological aims, the educational benefits flowing from PIRG's activities will not be available to them. Their beliefs exclude them from access to the programs that offer the educational opportunities. Despite that bar to participation, plaintiffs must nevertheless pay to support the organization.[4]

We conclude that defendants did not overcome the caution we raised in our first opinion -- the educational component cannot obscure the underlying substance of the plaintiffs' complaint that they were compelled to finance a political entity whose function is to attain certain fixed ideological objectives. 686 F.2d at 166.

Moreover, the evidence revealed that it is impossible to isolate the "educational component" from the ideological pursuits for purposes of apportioning the expenses attributable to each. It is difficult to believe that it could be otherwise since the educational benefits are intertwined and integrated with the political and ideological objectives. It is no simple task, and probably an impracticable one, to formulate principles that could be used to separate the educational component of lobbying, campaigning, or researching a paper that urges passage of certain legislation from the organization's ideological goal which is directly advanced by those activities.

The courts have observed that it is not always easy to prorate the expenses properly incurred by a union as collective bargaining representative with those involving political action. *See Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 52 U.S.L.W. 4499 (April 25, 1984). It is however even more complex

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4. Moreover, because they disagree with PIRG's policies, plaintiffs would not likely become members and hence would have no voice in the selection of leaders for the group. Again, that does not relieve them from the compulsory assessment.

in the case of PIRG because the educational gains are obtained only in direct pursuit of the ideological objectives.

In *Galda I*, we left open the possibility that the University might demonstrate a compelling state interest by establishing the importance of PIRG's "contribution to the university forum." Because he believed that plaintiffs had failed to present a prima facie case, the district judge did not reach this question. The defendants did, however, have the opportunity to produce evidence on this point and rather than remand again for a determination of what is primarily a legal question, we address the matter here.

The University shoulders a heavy burden to justify its determination to levy the assessment. A state may not choose means that unnecessarily restrict constitutionally protected liberty, if there is open a less drastic way of satisfying its legitimate interest. Nor may the state choose a legislative scheme that broadly stifles the exercise of fundamental liberties. *Elrod v. Burns*, 427 U.S. 347, 363 (1976); *Buckley v. Valeo*, 424 U.S. at 25.

The compelling state interest in eliminating "free riders" in the interest of preserving labor peace in the union dues context, *see Machinists v. Street*, 367 U.S. 740 (1961), does not exist in the circumstances here. The University has presented no evidence, nor do we believe it could, that the educational experience which it cites as justification could not be gained by other means which do not trench on the plaintiffs' constitutional rights. We recognize that a union's concerns and those of a university differ, particularly in light of the latter's traditional interest in presenting and discussing differing philosophies and theories on a wide range of topics. The relevance of *Abood*, however, is not lost because of those distinctions.

As we cautioned earlier, we do not here decide the constitutionality of a university's allocation of a compulsory activity fee. But a comparison of that procedure with the "content neutral" funding scheme for entities outside the university as used at Rutgers is helpful in demonstrating the objectionable features of the mandated fee challenged here.

One of the arguments used to justify allocation of activities fees to speakers or campus organizations that present controversial views is the educational necessity of exposing the university community to a diversity of responsible opinion. In fulfilling its role, it is expected that a university will strive for balance and afford adequate opportunity for offering opposing viewpoints.

There is room for argument that a university's role of presenting a variety of ideas is a sufficiently compelling reason for some infringement of First Amendment rights just as is the need for labor peace in the union dues cases. That contention loses its force, however, when an outside organization independent of a university and dedicated to advancing one position, is entitled to compelled contributions from those who are opposed. In that situation a university's ability to insure a balance in access is infringed, if not prevented, in some circumstances and the quid pro quo for a payment to a forum disappears.

Generally, when an activity fund comes into existence, all student groups on campus are free to compete for a fair share. That is not the situation here where the mandated contribution is earmarked for only one organization, an organization which has no obligation to use any part of the fund for the benefit of a group which pursues a different philosophy.

The University appears to argue that the neutral funding policy supplies the requisite opportunity for equal access, but it is no answer to say that opponents

may utilize the "neutral funding" policy to support a vehicle of their own. For example, the opponents may be small in number, as is apparently true here, and unable to attract the necessary student support. No extended discussion is required to explain the basic concept that the First Amendment protects the views of a minority as well as those of the majority.

Moreover, even if the opponents succeed in achieving mandatory contributions for their own organization, they are not relieved from the obligation to pay a fee to a group with which they disagree. For example, if the university compelled a student to make separate contributions to both the Democratic and Republican National Committees, the evil is not undone; it is compounded. Adherents to each party would be forced to pay a fee to the other political group, a clearly unconstitutional exaction.

The objection to funding an outside entity through the "neutral funding" procedure is that the result achieved is not neutral and does not achieve equal access. The process offers an opportunity for a majoritarian group to compel support from minorities in circumstances where no compelling state interest justifies the limitation on First Amendment rights.

The situation is quite different than that which would be presented if the outside organization, for example, were a well equipped museum or symphony society where the university had no comparable facilities to enhance its teaching capacity. Nothing in the record here demonstrates that in its ordinary operations the University is unable to offer students the opportunity to learn about environmental or consumer concerns or similar matters advocated by PIRG.

The University has thus failed to show any compelling state interest that would justify overriding the plaintiffs' First Amendment rights.

It follows, therefore, that the district court erred in concluding that plaintiffs had failed to make out a prima facie case. They presented credible evidence that PIRG was an outside independent, ideologically-oriented organization whose activities they opposed but were nevertheless compelled to support directly through a mandatory fee. Those facts were not disputed, and by presenting that evidence plaintiffs established a prima facie case.

The University relied on the deference to be given its judgment as to PIRG's educational value. But as has been discussed, that judgment was not supported by evidence of an educational component other than that incidental to, and inherent in, the ideological activities. Moreover, the district court did not make any findings to demonstrate a compelling state interest that would justify utilization of PIRG as a vehicle for the incidental educational benefits in preference to a campus, or another outside organization, which did not require the compelled support of plaintiffs.

Defendants did not produce any evidence that would allow an advance proration of the mandatory fee, *see Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), and we have previously found the rebate procedures unsatisfactory. Hence, the exaction of a compulsory fee payable to PIRG cannot continue. We, of course, make no judgment as to a voluntary contribution program.[5]

Accordingly, the judgment of the district court will be vacated and the case will be remanded to the district court for the entry of an order enjoining the assessment of the mandatory fee payable to PIRG.

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5. At trial, the voluntary funding procedures used by PIRG at the University of Minnesota and the University of Massachusetts were described in some detail. We do not express any views on those procedures, but they do differ from Rutgers' because they allow students to decide in advance if they wish to support PIRG.

ADAMS, *Circuit Judge*, dissenting.

I.

I agree with the majority that PIRG's objectives are in some sense political; I also share the majority's implicit doubts about the wisdom of the Rutgers funding policy that is under review here. Nonetheless, I am impelled to dissent, for in my view, the First Amendment does not permit the courts to translate a determination that speech is political or that a university's decision is unwise into a conclusion that an outlet for campus speech is unconstitutional and must be foreclosed. When a disagreement with the politics of a group or the wisdom of a policy is transformed into intrusive judicial review of core university decisions, I believe we take an improvident step. Indeed, as I read the applicable Supreme Court cases and this Court's decision in *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982) (*Galda I*), the First Amendment not only fails to support such an approach, it may very well preclude it.

The crux of my disagreement with the majority concerns the proper interpretation and application of the prima facie threshold this Court articulated in *Galda I*:

> To overcome the presumptive validity of the university's judgment that an organization contributes to the university community, and to make out a prima facie case that exaction of the fee conflicts with the mandates of the First Amendment, persons objecting to the fee must establish that the challenged group functions *essentially as a political action group with only an incidental educational component.*

686 F.2d at 166 (emphasis supplied). The majority reads the standard established in *Galda I* to require courts to weigh a group's political objectives against its

educational benefits to determine which are "primarily" its goals. *See* Majority Typescript at 16. This interpretation allows the majority to concede that PIRG provides students with "considerable" training, and yet to conclude that such educational benefits are only "incidental" to its main objectives."[1] *Id.* Under the majority's reading, if the group's principal objectives are political, the extent of its educational benefits is necessarily incidental, or secondary. *Id.* In my view, this analysis misconstrues the *Galda I* standard, and improperly extends the compelled association doctrine to a university setting without adequately considering the university's central role of providing an education through the exchange of diverse viewpoints. Because the majority's result conflicts with several lines of First Amendment precedent, I respectfully dissent.

II.

Resolution of the issues raised in this appeal requires careful attention to the particular features of the challenged funding mechanism. *See, e.g., Ellis v. Brotherhood of Railway, Airline, & Steamship Clerks*, 104 S. Ct. 1883 (1984). The majority acknowledges that the $3.50 fee is fully refundable, but then repeatedly

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1. The district court's final factual finding was as follows: "The court finds that PIRG has a very substantial educational component, and that its presence at Rutgers significantly enhances the educational opportunities available for students at that institution." Galda v. Rutgers, 589 F. Supp. 479, 496 (D.N.J. 1984).

   Appellants do not challenge this factual finding as clearly erroneous, nor does the majority dispute its accuracy. Thus, the majority begins with the unchallenged finding that "PIRG has a very substantial educational component," yet concludes, without overturning any factual finding, that PIRG's "educational benefits are only 'incidental.'" Majority Typescript at 16. I do not believe that a fair reading of *Galda I* empowers us to so disregard the district court's factual finding regarding educational benefits. *See infra* pp. 16-18.

characterizes the refundable fee, incorrectly I believe, as a "mandatory assessment" or "compelled contribution." See Majority Typescript at 14, 18, 20, 22-25. This case necessarily implicates competing First Amendment interests of the university itself, as well as of those students who participate in PIRG, those students who merely desire exposure to its viewpoints, and those students -- plaintiffs here -- who oppose its views altogether. Where so many competing interests are involved, it is crucial to consider the extent of infringement of plaintiffs' rights. *See Kania v. Fordham*, 702 F.2d 475, 476 n.3 (4th Cir. 1983) (noting in a similar case challenging mandatory funding of a "liberal" school newspaper that amount of fee compelled is $4.60 a year, and that extent of abridgement must be considered in striking the balance between educational goals of the university and the speech and association rights of its students); Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. Rev. 995, 1014-17 (1982) (arguing that Supreme Court's decisions in compelled association cases can be reconciled only by considering the extent of the infringement on individual's right not to associate). Plaintiffs' complaint concerns a temporary, fully refundable, payment of $3.50 a year. As this Court has pointed out, "a temporary deprivation of funds does not have the same impact on constitutionally protected speech that the denial of a forum or the forcible contribution to a political cause against one's will would have." *Robinson v. State of New Jersey*, 741 F.2d 598, 611 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1228 (1985).[2]

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2. In *Robinson*, we found support in Justice Harlan's opinion in Lathrop v. Donohue, 367 U.S. 820, 848 (1961) (Harlan, J., concurring). In that case, a lawyer challenged as "compelled association" the requirement that he pay dues to a bar association that lobbied for legislation that he believed was not

Imposition of a wholly refundable fee to support one voice in a university forum is a far cry from the sorts of compulsion heretofore considered unconstitutional under the compelled association doctrine. In *Barnette*, the foundation of this doctrine, students were literally compelled to stand up and recite in public a pledge that they did not believe. In *Wooley v. Maynard*, 430 U.S. 705 (1977), individuals were compelled to display in public a motto that offended their religious tenets. And in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), union members were forced to provide financial support to an organization whose sole purpose was to serve as their exclusive mouthpiece, but which promulgated views that some members opposed.

Rutgers forces no student to participate in or pledge allegiance to PIRG. Moreover, PIRG is in no way

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in his interests. Justice Harlan found the situation clearly distinguishable from West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), where students were required to salute the flag against their will:

> What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not of the dues payer), which views may turn out to be contrary to the views of the dues payer.

Id. at 858. Justice Harlan found the difference in degree "so great as to amount to a difference in substance." *Id.* He pointed out that without a recognition of that difference, any taxpayer could object to his funds being used for military purposes, or for "school textbooks or instruction which he finds intellectually repulsive." Id. at 860. That, however, was not and is not the state of the law. See Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 268 (1934); *see also* United States v. Lee, 455 U.S. 252 (1982); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85-88 (1980).

the sole mouthpiece of Rutgers students, and does not purport to speak for the student body on any matter. Rather, it participates as one voice among many student groups, all of which receive some level of funding from student fees, and all of which contribute distinct ideological viewpoints to the university forum. PIRG and the school newspaper do receive more funds than other student groups, but only because they have satisfied certain objective requirements open to all regarding educational benefits and widespread student support. The PIRG fee is, moreover, fully refunded within the school year when a student checks off a card included with the term bill.

Thus, we must keep in mind the relatively minimal degree of infringement on plaintiffs' First Amendment rights. Because *Galda I* was decided at the summary judgment stage, we had to assume that PIRG had only an incidental educational value and was not otherwise justified. We held in those circumstances that the refund mechanism would not be sufficient to cure the constitutional defect. The majority appears to consider the refund issue decided for all situations. See Majority Typescript at 24. The *Robinson* and *Ellis* decisions, however, demonstrate that whether and how the fee is refundable are critical considerations in weighing competing interests and balancing relative infringements of rights.

The fact that the PIRG fee is fully refundable serves two purposes. First, it allows objectors to register their position immediately, so there is less danger that their views will be confused with those of PIRG. Second, it gives objectors their money back, so that they are not in fact compelled to support the group. If the funding mechanism were shown to be merely a ruse for advancing certain ideological views, this Court has held that the refund would not be sufficient. *Galda I*, 686 F.2d at 169. If plaintiffs had demonstrated that the added institutional support provided by the separate

funding mechanism was motivated by educators' ideology rather than by their desire to assure the vitality of an organization engaging widespread student interest, I would not dissent, regardless of the refund. Where no such showing has even been suggested, however, and where PIRG in fact has been found by extensive testimony to have "a substantial educational component," the effect of the refund mechanism is relevant in determining the extent of the First Amendment infringement relative to competing interests of other students and the university. As will be demonstrated, the competing interests involved here are considerable. In view of those interests, I conclude that a fully refundable fee of only $3.50 per year does not impermissibly violate the First Amendment rights of objectors.

III.

A.

Four distinct lines of First Amendment doctrine converge in this case to suggest that the majority's interpretation of *Galda I* is incorrect. The first, perhaps best characterized as prudential, concerns the limited role of federal courts in overseeing a university's educational policy. The majority's rationale subjects state university academicians to intrusive judicial oversight in educational matters, contrary to Supreme Court admonitions about the necessity for deference in this area. *See Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981); *id.* at 279 n.2 (Stevens, J., concurring); *Healy v. James*, 408 U.S. 169, 180-81 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).[3] This

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3. In another school setting, this Court recognized the fundamental importance of limiting judicial intrusion in academic affairs. *See* Seyfried v. Walton, 668 F.2d 214, 216-17 (3d Cir. 1981) (refusing to intervene where school

call for deference is not intended to denigrate students' First Amendment rights; rather, it recognizes that federal court review of university decisions carries serious implications for academic freedom. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Under the majority's reading, the only limitation on judicial intrusion is a judge's view of what constitutes a "political" objective.[4] The majority states that where a judge finds that a group assisted by the university through student fees is "primarily political"

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superintendent suppressed speech based on sexual content, because "those responsible for directing a school's educational program must be allowed to decide how its limited resources can be best used to achieve the goals of educating and socializing its students"); *see also* American Future Systems v. The Pennsylvania State Univ., 752 F.2d 854, 870 (3d Cir. 1984) (Adams, J., concurring).

4. The problem with the majority's exclusive emphasis on a group's political quality is that almost any group's objective, no matter how educational it may also be, can be characterized as political. "Virtually all educational decisions necessarily involve 'political' determinations." Board of Educ. v. Pico, 457 U.S. 853, 890 (1982) (Burger, J., dissenting).

   The majority defines as political only those groups with "a frankly ideological bent." Majority Typescript at 16. The difficulty with this definition was succinctly expressed by Judge Wright in Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 661 (D.C. Cir. 1971), *rev'd sub nom.* Columbia Broadcasting System, Inc. v. Democratic Nat. Comm., 412 U.S. 94 (1973):

   > The line between ideological and nonideological presentations is an almost impossible one to draw. All too often in our society one particular ideology -- that of passivity, acceptance of things as they are, and exhaltation of commercial values -- is simply taken for granted, assumed to be a nonideology, and allowed to choke out all the rest.

   See also Lawrence Univ. Bicentennial Comm'n v. City of Appleton, 409 F. Supp. 1319, 1326 (E.D. Wis. 1976).

in nature, the First Amendment mandates that the group be denied such assistance. While it attempts to limit its holding to the facts of this case, no principled basis is advanced to distinguish the program in question here from the mandatory general activities fee that supports such student groups at Rutgers as the ACLU and the NAACP, or indeed, from similar mandatory activity fee programs in state universities across the country. The majority's rationale suggests, for example, that if a law journal at a state university can be said to have political objectives -- insofar as, like PIRG, it might take a particular ideological stance, and seek to influence legislation on issues of public controversy beyond the campus environs -- its funding from student tuition or fees must be cut off.[5]

The mere possibility of such judicial oversight of educational decisions effectively invites abusive

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5. The majority proposes two distinguishing factors: (1) PIRG is an independent "outside" organization, while student activity groups are "inside" the university; and (2) the university maintains control over the student groups funded through the general activities fee, and can therefore "insure a balanced approach." Majority Typescript at 22. The inside-outside distinction does not withstand scrutiny: certainly many student group activities will extend outside the university, and there is no university regulation, nor any First Amendment requirement, forbidding student groups from venturing beyond campus boundaries to further their interests or education, or from concerning themselves with effecting change outside the university. Under the majority approach, a human rights student group that takes a stand on apartheid would risk losing its funding. Student groups funded through the general activities fee at Rutgers include the Rutgers University Legislative Action Committee, which lobbies in Washington, D.C. and Trenton. 598 F. Supp. at 482. With respect to PIRG's "independence," there would appear to be no constitutionally significant difference between funding a local student chapter of the nationwide NAACP and funding a local board of New Jersey PIRG, whose membership extends only to university students across the state.

litigation by any student who objects to the political position of a funded student group. Whether or not such suits ultimately succeed, their institution, and even the likelihood of their institution, would seriously restrict the First Amendment freedom of state universities to provide a wide-open marketplace of ideas, and of student groups to speak out on matters of public importance.

B.

A further indication that the majority's reading of *Galda I* has missed the mark is its result: the Court orders a state university to exclude from a refundable arrangement a group that repeatedly has met all objective requirements of an equal access forum, and that concededly provides substantial educational benefits to the students, simply because the content or objectives of the group's speech are too "political." This comes close to requiring a state university to do

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There is also no support in the record for the majority's second distinction. Indeed, the record demonstrates that the university has the capacity to keep tighter control on PIRG than on its internal student groups. PIRG is subject to triennial review before the university board and the general student body; other student groups do not answer to the university or to the student body as a whole. In addition, this distinction appears to be based on the notion that universities have a constitutional duty under the First Amendment to "insure a balanced approach." *Id.* at 22. Thus, the majority concludes, "the objection to funding an outside activity is that the result achieved is not neutral." *Id.* at 23. But it is only access that must be neutral, not results. Beyond the broadcast media context, attempts to exert government content control in order to achieve "balance" are prohibited by the First Amendment. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The university does not, and under the First Amendment probably may not, insure balance in the allocation of its general student activity fee, and thus the "quid pro quo" to which the majority refers simply does not exist under any funding program. *See* Majority Typescript at 22.

precisely what the Supreme Court declared unconstitutional in *Consolidated Edison v. Public Service Commission*, 447 U.S. 530 (1980). There, the Supreme Court held that a state body may not prohibit a utility from using bill inserts to discuss "political matters." 447 U.S. at 532. Here, the majority holds that a state body *must* exercise content control in a manner that will inhibit speech that is primarily political, or politically motivated.[6]

As the Court stated in *Consolidated Edison*, the prohibition or inhibition of speech concerning issues of public controversy "strikes at the heart of the freedom to speak." 447 U.S. at 535; *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("there is practically universal agreement that a major purpose of the [First] Amendment was to protect the free discussion of governmental affairs").

C.

Perhaps more fundamentally, the majority's reading is inconsistent with the two central doctrines that guided the Court in *Galda I:* (1) the analysis applied to claims of compelled association in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); and

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6. The majority insists that it is not ordering PIRG silenced, but only demanding that it not be funded in this particular manner. But for First Amendment purposes, a cutoff in funding because of political content is just as impermissible as outright suppression. *See* Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983) (university cannot change method of funding school newspaper on basis of newspaper's content). As the Court reiterated in Healy v. James, 408 U.S. 169 (1972), involving the right of the Students for a Democratic Society to be officially recognized as a student group, "freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental influence." *Id.* at 183 (quoting Bates v. City of Little Rock, 361 U.S. 516, 523 (1960)).

(2) the public forum doctrine as applied in *Widmar v. Vincent*, 454 U.S. 263 (1981), and related cases.

In *Abood*, the Supreme Court held that the imposition of compulsory union dues violated objectors' First Amendment rights not to associate when such dues were used for political purposes unrelated to bargaining. *Abood* does *not* stand for the proposition that no political speech may be funded by mandatory union dues. Only political speech substantially *unrelated to* the union's central purpose -- collective bargaining -- may not be so funded. The *Galda I* test substitutes the university for the union, by barring mandatory funding of political speech substantially *unrelated to* the university's central purpose -- providing an education.[7]

Abood and its progeny are best understood as establishing a two-step inquiry where claims of compelled speech are raised in a context of institutional fees. The first determination, whether the speech is political, reveals the extent of the infringement caused by compelled support. *See Ellis v. Brotherhood of Railway, Airline, & Steamship Clerks*, 104 S. Ct. 1883, 1896 (1984) (compulsory contributions to union's *social* activities do not implicate any greater infringement on First Amendment rights than the permissible contributions already required for collective bargaining). Once an infringement is

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7. While *Abood* guides us in considering the rights of students not to associate, it is important to note the differences between compulsory union dues and a mandatory student fee. *See supra*, Section II. The justification for compelling union dues was found in a legislative judgment that collective bargaining was crucial to labor peace. *Abood*, 431 U.S. at 224. The justification for compelling student fees in a university setting is found in the First Amendment itself, which protects a university's right to educate, and students' rights to be educated by exposure to diverse ideological viewpoints.

identified, the second and more crucial question is whether the compulsion is nevertheless justified because the speech is germane to the institution's purpose.

The two-step analysis required by *Abood* and *Ellis* is confirmed by this Court's recent application of *Abood* in *Robinson v. State of New Jersey*, 741 F.2d 598. In *Robinson*, we upheld the constitutionality of compelled support for lobbying on behalf of public employees' contracts, on the ground that activity relevant to collective bargaining may be funded even if it is also political. 741 F.2d at 609.

The *Galda I* standard is drawn from *Abood*, and incorporates *Abood's* two-part inquiry. *Galda I* directs the district court to ask (1) whether the group funded is primarily a political action group; and (2) if the group is political, whether its speech is nonetheless germane to the university's purpose in providing an education through exposure to a marketplace of ideas -- i.e., whether the group has more than "an incidental educational component." 686 F.2d at 166. The majority sidesteps the second part of the *Galda I* prima facie inquiry by finding that the group's "political" objectives effectively negate its educational component. It holds that where a group's objectives are primarily political, the extent of the group's educational benefits to the university community is immaterial. This application treats a two-step test as a call to subjective balancing.

Although some of its activities are political, the district court found that PIRG does in fact play a significant educational role in the university forum, and has a "very substantial educational component." 589 F. Supp. at 496. In minimizing PIRG's educational benefits, the majority determines *sub rosa* that this finding is clearly erroneous. The district court's finding, however, is comprehensively supported by the

record, which includes the following facts:

1. PIRG's objectives, as stated in its Articles of Incorporation, are two-fold:

> a. to engage in non-partisan analysis, study and research of such issues as urban revitalization, consumer protection, resource planning, urban and rural occupational safety and labor conditions, protection of natural areas and environmental quality, racial and sexual discrimination, landlord-tenant relations, delivery of health care and similar matters of urgent or long-range concern to the general welfare of the people of the State of New Jersey.
>
> b. to make available to the public at all times a full and fair exposition of the pertinent facts and results of such non-partisan analysis, study and research so that citizens may form independent conclusions beneficial to the community.

Galda v. Rutgers, 589 F. Supp. at 487.

2. PIRG's activities, in addition to the lobbying highlighted by the majority, include: sponsorship of debates, lectures, and public fora within the university on issues of public policy; publication and distribution on campus of informational pamphlets and consumer guides on various topics, including solar energy, student financial aid, and the transportation system at a Rutgers campus; non-published research papers on similar subjects; staffing a consumer hotline; and conducting a "streamwalking" program to identify sources of illegal water pollution. *Id.* at 487-88.

3. PIRG is governed entirely by students elected by their peers at both the local and state levels. It is "independent" from Rutgers only insofar as its governing board includes students drawn in addition from several other universities in the state. Its work is conducted by student volunteers, student interns who

receive academic credit, and several staff employees. PIRG's educational benefits were testified to by eight past and present students who had participated in PIRG, *id.* at 489-90; nine faculty members who had supervised student internships with PIRG, *id.* at 490-92; and four experts, including two university presidents, a vice-president, and a chancellor, *id.* at 493-94.

4. Plaintiffs called no Rutgers students or faculty to rebut the testimony from students and faculty presented by defendants. The sum total of plaintiffs' testimony consisted of three outside experts. Of the three, one testified that extracurricular student activities were "merely peripheral to a university's educational mission," and another stated that "universities should be places where students are somewhat removed from ideologies and as fair and dispassionate as possible." *Id.* at 492-93.

Given these comprehensive, painstaking findings by an able district judge, I do not believe we can say that the district court erred in concluding that the plaintiffs failed to make out a prima facie case, because PIRG has more than an incidental educational component.

D.

My most critical concern regarding the majority's First Amendment analysis is its narrow focus. This focus may be attributable to the posture of this case, which was initiated by a handful of students objecting to the funding of a particular group. The *Galda I* prima facie threshold concentrates in the first instance on these objections, but the majority's interpretation renders that focus exclusive. The majority approach implies that the only First Amendment interest at stake is that of objecting students not to have $3.50 temporarily exacted from them. The Court in *Galda I*,

however, recognized that there were other interests at stake, and insisted that the inquiry also consider the role of the particular group in the "total university forum." 686 F.2d at 166-67.

A broader perspective demonstrates that we are not dealing with a single speaker, but with one of many speakers in an equal access university forum that also supports a variety of student groups. In addition, we must consider not only the rights of the objecting students, but also the right to associate effectively of the large number of students who voted for, participate in, and want to support PIRG, as well as the right of the student body as a whole to receive information through the exchange of ideas that inheres in the very nature of a university education. Finally, the majority may be overlooking the delicate First Amendment role of a state university in operating an equal access educational forum.

While these additional considerations may appear to complicate the task, they point to a well-established doctrinal approach developed precisely for situations in which all of these competing interests are inevitably intertwined -- the public forum doctrine. That doctrine holds that where the state opens a forum to expression, it must operate the forum on a content-neutral basis. *See generally Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 103 S. Ct. 948 (1983); *Widmar v. Vincent*, 454 U.S. 263.[8]

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8. "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972), cited by both majority and concurrence in Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 176 (1976).

Developed to protect groups excluded from a state forum on the basis of the content of their speech, the public forum doctrine also answers many of the concerns raised by the objecting students here. Whenever a government body supports speech, it might be charged that those who contribute to that body, either through taxes, tuition, or fees, are compelled to support a particular point of view. At the same time, government institutions control many effective fora for speech, so if objectors' complaints were everywhere converted by the First Amendment into bars to speakers' access and support, the marketplace of ideas would be restricted. Therefore, the First Amendment requires the government to administer a public forum on a content-neutral, equal access basis (with the exception that a forum may be reserved for its intended purpose).[9] If this rule is followed, the objectors' compelled support is not tied to any particular viewpoint, but to the forum as a whole. As long as the contribution is to a public forum, rather than to an ideological group, the First Amendment is not impermissibly infringed. *See Veed v. Schwartzkopf*, 353 F. Supp. 149, 152 (D. Neb.) (applying public forum analysis to claims of infringement on right not to associate), *aff'd mem.*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); *Lace v. University of Vt.*, 131 Vt. 170, 303 A.2d 475, 479 (1973) (same); Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L. Rev. 3 (1983) (arguing that critical constitutional interest in

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9. *See* Perry Educ. Ass'n. v. Perry Local Educators' Ass'n. 103 S. Ct. 948, 955 (1983). *Perry* suggests that it is permissible to limit access on educational grounds, *id.* at 955 n.7, but *Consolidated Edison* suggests that it is not permissible to limit access on "political" grounds.

compelled association or speech cases is government establishment of particular points of view).

The public forum doctrine accommodates the various First Amendment interests implicated in the educational context -- it permits a university to facilitate an exchange of diverse viewpoints; it provides students the opportunity to receive the educational benefits of such an exchange; it allows those students who want to associate the right to do so effectively; and it ensures that students who do not want to associate with a particular point of view are not forced to support a particular group, but rather an entire forum.

The doctrine has been applied in the educational context. "The campus of a public university, at least for students, possesses many of the characteristics of a public forum." *Widmar v. Vincent*, 454 U.S. at 267 n.35 (cited in *Galda I*, 686 F.2d at 166); *cf. Healy v. James*, 408 U.S. at 180 ("The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'") In *Widmar*, the Court utilized a public forum analysis in considering whether a religious group could be allowed to use state university facilities. The Court noted that the university had created an open forum for student groups, and that having done so, it could exclude a group from the forum on the basis of the religious content of the group's intended speech only if it showed that "its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." 454 U.S. at 270. Where the university merely allowed religious groups equal access with other groups, the Establishment Clause did not amount to a compelling state interest. *See also Bender v. Williamsport Area School District*, 741 F.2d 538 (3d Cir. 1984) (applying public forum analysis for public high school); *cf. International Society for Krishna Consciousness, Inc. v. New Jersey Sports & Exposition Authority*, 691 F.2d

155, 160 (3d Cir. 1982) (dicta stating that public high school constitutes a limited public forum).

In this case, as in *Widmar*, the university has created an open forum.[10] Any group that meets certain criteria regarding educational value and student support is granted access through the neutral funding mechanism. Student groups receiving less wide-ranging support are also granted access, through the mandatory fees program. There is no evidence in the record, nor any allegation in the complaint, that either the neutral funding mechanism through which PIRG is supported, or the university forum as a whole, is operated on other than legitimate educational equal access grounds.[11] The issue here is whether a *political*

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10. The prima facie standard set out in *Galda I* is a litmus test, applicable to the specific facts presented by the Rutgers funding procedure, for identifying a potentially non-neutral access policy. The university's stated position holds out that any group which meets certain objective requirements showing substantial student support, and which is considered educational by the University Senate, will be funded. Under *Galda I*, if a participant in such a forum is shown to be "essentially a political action group with only an incidental educational component," a prima facie case is established, because such a showing suggests that the university is not in fact operating the forum on the legitimate terms that it has specified.

11. The majority suggests that the democratic aspect of the neutral funding mechanism -- requiring a showing of widespread student support prior to access -- violates the First Amendment. While at some point a majoritarian requirement that effectively served to silence dissenters would violate the First Amendment, such a showing has not been made here. Thus, if the "neutral funding mechanism" were the only access route to the Rutgers University forum, the First Amendment might arguably be violated. So long as the university also provides access to its forum to minority voices, as it does here through the general activities fee program, however, it would not appear to violate the First

group may be allowed access to that forum without violating competing rights of objectors. The competing interest in *Widmar* was establishment of religion; the competing interest in *Galda* is the objectors' right not to have $3.50 temporarily taken from them in violation of their right not to associate with groups with which they disagree. In *Widmar*, the Establishment Clause was not considered compelling in that particular setting because where the university had created an open forum that accommodated religious groups, the "open forum ... does not confer any imprimatur of State approval on religious sects or practices" granted access to the forum. 454 U.S. at 274; *see also Bender*, 741 F.2d at 561 (Adams, J., dissenting) (advocating same result in secondary school). Similarly, here, the Rutgers open forum does not confer any imprimatur of approval (by the university *or* by the students paying fees to the university) upon the ideologies of groups granted access to the forum. PIRG's participation in the forum indicates only that, like the school newspaper, it met the educational and objective criteria set forth by the university.[12]

The public forum analysis in *Widmar* and *Bender* insists that courts not allow (and, logically, not require) content-based exclusions from an otherwise equal access educational forum unless there is a

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Amendment simply to provide greater support through a separate mechanism to those groups commanding greater interest.

12. It might be preferable if the term bill contained a statement noting that PIRG and the school newspaper are funded as participants in the university forum because they have satisfied the requirements of a neutral funding mechanism open to all applicants, and that no institutional support of its political viewpoints should be implied. If such a statement were added, there would not even be any superficial differences between the general student activities fees and the neutral funding mechanism fees.

compelling state interest. The question that must inform the entire analysis, therefore, is whether a student's right not to have $3.50 temporarily exacted from him for a forum that supports a group with which he disagrees is a sufficiently compelling state interest to justify an exclusion based on the political content of the group's intended speech.

This is not to suggest that in all instances the operation of a bona fide equal access forum should suffice to defeat objectors' complaints of compelled association, but only that in many situations such a forum best balances the interests of objectors against the interests of speakers and listeners in a robust exchange of ideas. It does so, moreover, without requiring the inhibition of speech. The majority's result, on the other hand, would effectively inhibit political speech under the rubric of the First Amendment. Although we must be careful not to minimize the complaints of objectors, at the same time we must not exaggerate those complaints to the detriment of equally important competing First Amendment rights. As is so often the case in the First Amendment field, we are confronted with competing interests, not absolute rights. I would hold that where a state university establishes an educational equal access forum funded by student fees, it does not impermissibly violate objecting students' First Amendment rights by directing their fees to particular groups, so long as it grants access to the funding mechanism on educational and equal access grounds.

IV.

The First Amendment clearly does not prohibit nonpartisan[13] political speech or association in state

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13. It is important to recognize the difference between "partisan" and "political" speech. Rutgers does discriminate

universities; indeed, the spirit of the First Amendment suggests that courts should do everything within reason to *protect* political speech in the educational setting. *Healy v. James*, 408 U.S. 169; *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503. Outlets for effective speech or association on campus cost money, some of which may and often does come from students' tuitions or fees.[14] Oftimes a conflict between speakers and objectors will arise. Unless a veto is to be granted to all objectors to "political" speech, we must consider the competing interests, and seek an appropriate balance. In many cases, the public forum approach strikes such a balance. Here, the availability of a refund further protects the rights of objectors. Only in rare cases should the balance be struck by excluding political speech.

When the federal courts undertake judicial review of educational decisions of state university officials, it is critical that the boundaries of that review be carefully delineated. When the only limit on such review is a judge's definition of "political," we may have

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against partisan speech, by prohibiting its funding. The Supreme Court has held that it is constitutionally legitimate to prohibit support of *partisan* activities by government bodies or employees. *See* United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); *id.* at 557, 561-62 (noting expressly that restrictions were limited to partisan political activity, and allowed employees to participate in all nonpartisan political activity); *see also* United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947). Thus, the Democratic and Republican parties can and will be barred from access to the Rutgers forum, even though PIRG may not be barred.

14. It has been estimated that approximately 90% of colleges appropriate money to student groups from mandatory fees or directly from their budget. D. Meabon, R. Alexander & T.F. Hunter, *Student Activity Fees* 20-33 (1979).

overstepped our bounds. And when the result of such review is the inhibition of speech on the basis of its political content or motives, the First Amendment has not been served. Accordingly, I dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-5498

JOSEPH P. GALDA, et al.,

Appellants

v.

RUTGERS, The State University of New Jersey, et al.

The New Jersey Public Interest Research Group, Inc.,

Intervenor

(C. A. No. 79-2811)

Argued February 26, 1985

Before: ADAMS, WEIS and WISDOM,*
Circuit Judges

ORDER AMENDING OPINION

It is ORDERED that the slip opinion filed August 28, 1985 in the above case be and the same hereby is amended as follows:

Page 21, Para. 2,
Line 18 should now read:

Where the university merely allowed religious groups equal access with other groups, it did not

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* Hon. John Minor Wisdom, United States Court of Appeals for the Fifth Circuit, sitting by designation.

infringe the Establishment Clause, and the university's exclusion of religious groups could not be justified.

Page 37, Line 3
should now read:

interest in *Widmar*, it was argued, was the protection of members of the university community against the establishment of religion; the

Page 37, Line 8
should now read:

was not deemed to have been infringed in that particular

BY THE COURT,

/s/ Arlin M. Adams
Acting Chief Judge

DATED: September 10, 1985

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5498

JOSEPH P. GALDA,

Appellants

v.

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY, et al.

Appellees

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 79-2811)

Present: ADAMS, WEIS and WISDOM,*
Circuit Judges.

ORDER AMENDING OPINION

It is ORDERED that page 2 of the slip opinion in the above captioned case be corrected to read that Joseph W. Marshall, III, Esquire, argued the case, *not* Joseph W. Marshall.

BY THE COURT,

/s/ Joseph F. Weis, Jr.
Circuit Judge

October 11, 1985

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* Honorable John Minor Wisdom, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2433

JOSEPH P. GALDA, PAUL EWERT, and CHRISTINA FARROW, Individually, and upon behalf of all others similarly situated

v.

DR. EDWARD J. BLOUSTEIN, Individually, and as President of Rutgers, The State University, DR. NORMAN REITMAN, Individually, and as Chairman of the Board of Governors of Rutgers, The State University of New Jersey, DONALD S. MCNAUGHTON, DAVID A. WERBLIN, KATHERINE ELKUS WHITE, DONALD M. DICKERSON, SANFORD M. JAFFE, ROBERT KAPLAN, EDWARD KRAMER, LINDA STAMATO, ROBERT J. TORRICELLI, Individually, and as members of the Board of Governors of Rutgers, The State University of New Jersey, DR. T. EDWARD HOLLANDER, Individually, and as Chancellor of Higher Education of the State of New Jersey, and WALTER K. GORDON, Individually, and as Dean of Rutgers Camden College of Arts and Science

INTERVENOR — The New Jersey Public Interest Research Group, Inc.

Joseph P. Galda, Paul Ewert, and Christina Farrow,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

C.A. No. 79-2811

Argued March 29, 1982

Before: ADAMS, SLOVITER, and BECKER, *Circuit Judges*

(Filed August 4, 1982)

MYRNA P. FIELD (Argued)
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Mid-Atlantic Legal Foundation
Philadelphia, Pennsylvania

Of Counsel:
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Cinnaminson, New Jersey
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MATTHEW P. BOYLAN
GREGORY B. REILLY (Argued)
Lowenstein, Sandler, Brochin,
Kohl, Fisher & Boylan
Roseland, New Jersey
Attorneys for Appellees

JOHN CARY SIMS (Argued)
ALAN B. MORRISON
Washington, D.C.
Attorneys for Intervenor

OPINION OF THE COURT

ADAMS, *Circuit Judge.*

Plaintiffs in this action are three former students at Rutgers Camden College of Arts and Science (RUCCAS), a unit of Rutgers, the State University of New Jersey.[1] In September 1979, the plaintiffs filed suit under 42 U.S.C. §1983, alleging that university officers and administrators had violated the students' first and fourteenth amendment rights by extracting from each student a refundable fee to support the New Jersey Public Interest Research Group (PIRG), an independent political/educational organization.[2] The district court held the PIRG funding arrangement constitutional as a matter of law because it contained a refund mechanism, and accordingly granted the defendants' motion for summary judgment. *Galda v. Bloustein*, 516 F. Supp. 1142 (D.N.J. 1981). We reverse and remand.

I

New Jersey PIRG is a non-profit, non-partisan corporation engaged in research, lobbying, and advocacy for social change.[3] Composed of approximately 21,000 student members at eight New Jersey colleges, includ-

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1. The record indicates that all of the plaintiffs were graduated from Rutgers by May 1982.

2. Defendants concede the presence of state action. *See* 516 F. Supp. at 1144 n.1.

3. New Jersey PIRG's Articles of Incorporation state that

> The purposes for which this Corporation is organized are:
>
> 1. to engage in non-partisan analysis, study and research of such issues as urban revitalization, consumer protection, resource planning, urban and rural occupational safety and labor conditions, protection of natural areas and environmental quality, racial and sexual discrimination, landlord-tenant relations, delivery of health care and similar matters of urgent or long-range concern to the general welfare of the people of the State of New Jersey.

ing RUCCAS,[4] PIRG is controlled by a state-wide board of student representatives, which determines PIRG's programs and policies. Although PIRG has an educational function — involving students "in real-life learning experiences [by] exploring the possibilities and difficulties of legal social change" — all the parties to this litigation agree that PIRG also functions as a political, ideological organization.[5]

NOTE — *(Continued)*

2. to make available to the public at all times a full and fair exposition of the pertinent facts and results of such non-partisan analysis, study, and research so that citizens may form independent conclusions beneficial to the community.

Appendix at A227.

4. In a referendum held in November 1981, PIRG did not receive enough votes to permit continued funding at the RUCCAS campus. *See* text *infra*. PIRG funding remains in effect at a number of other New Jersey colleges, including other Rutgers schools and campuses.

5. A brochure published by PIRG describes the following representative accomplishments:

To serve consumers, PIRG. . .

- testified before the Board of Public Utilities to oppose Jersey Cenral Power and Light's request to charge consumers for $113 million in costs resulting from the Three Mile Island accident. JCP&L was granted only a $45 million increase.
- published a 100 page *Directory of Consumer and Social Services*, which lists all federal, state and private agencies that handle consumer complaints.
- lobbied extensively for the federal Middle-Income Student Assistance Act, which became law, making millions of additional dollars available to low- and middle-income students to finance their education.

To protect the environment, PIRG. . .

- has documented water pollution violations by major N.J. industries such as Gulf and Western, Owens-Corning Fiberglass, and Republic Wire.
- lobbied extensively for the law that declared the upper 114 miles of the Delaware River "wild and scenic," thus preventing the building of the ecologically threatening Tocks Island Dam.

Because of PIRG's independent status, the organization is not eligible for student activity funds. In March 1972, however, Rutgers adopted a policy for funding student-sponsored programs and organizations, such as PIRG, that otherwise would not qualify for university financial support. The policy provides that:

> (1) Each organization is required to present its program and plans for concept review to the University Senate for recommendation to the President.
> (2) If approved, the organization shall seek college referenda on the issue of student funding support for their program. At least fifty per cent of the student body of each division of the University shall be required to participate in such referenda and a majority of those voting must approve the project in order for implementation within that division. As an alternate, an affirmative vote of twenty-five per cent

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- lobbied extensively for the Pinelands Preservation Act of 1979, which became law, establishing an 18-month moratorium on construction in the Pine Barrens.

To work for women's rights, PIRG. . .

- lobbied for the extension of the dea[d]line for states to ratify the Equal Rights Amendment, and continues to work for the passage of the amendment.

To work for safe, clean energy sources, PIRG. . .

- published *A New Jerseyan's Consumer Guide to Solar Energy Systems*, a 219 page book about buying, building and financing solar energy systems.
- drafted legislation that mandated a study of the co-generation of electricity for consumers and steam for industry, a process with the potential to save New Jerseyans millions of barrels of oil and millions of dollars every year.
- published a 50 page critical examination of nuclear power, entitled *Everything You Wanted To Know About Nuclear Power, But Were Afraid To Find Out*.
- helped establish New Jersey Solar Action, a coalition of concerned citizens and organizations who promote solar and other renewable energy sources in New Jersey.

Appendix at A776.

of the student body plus one shall be adequate to meet this test.

(3) The organization shall then be listed on the University term bill with payment of the indicated fee mandatory. A post-card asking for a refund shall be included along with the term bill which shall be sent by the individual student to the organization and which shall send the refund directly to the student.

(4) Each organization so funded shall be expected to defray the University cost of administration of the fee collection.

(5) Each organization shall be required every three years to meet the tests defined under items #1 and #2 above in order to continue to receive funds under this policy and procedure.

Appendix at A871-72. PIRG first qualified for funding under the university policy in 1972.

In practice, the PIRG funding system worked as follows: each semester, matriculating students were provided with a bill that included a charge of $2.50,[6] identified as the PIRG fee. The fee was described as mandatory, although apparently there were no sanctions for nonpayment. The bill was accompanied by a flyer describing PIRG; the back of the flyer contained a "Refund Request" form, which could be completed by the student and submitted to PIRG.[7] After receiving a refund request, PIRG verified that the individual was enrolled at Rutgers and had paid the fee. PIRG then issued a check directly to the student, but it took "several months" before the refunds were actually made.

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6. Until 1978, the PIRG fee was $1.50.

7. As the district court noted, this procedure varies from that mandated by the Rutgers funding policy, which specifies that a "post-card asking for a refund" must accompany the term bill. 516 F. Supp. at 1145 n.6. Our analysis of the case does not depend on the particular means by which the student requests a refund.

Plaintiffs, who oppose many of the ideological positions taken by New Jersey PIRG, filed this action on behalf of themselves and as purported representatives of a class of all students in good standing at RUCCAS at any time between September 1, 1977 and April 1, 1980. Essentially, the plaintiffs allege "[t]hat the disbursement of funds derived from mandatory student fees to and for the benefit of [PIRG] has required and shall require the Plaintiffs herein to support financially views which they do not advocate" and that such disbursement violates the plaintiffs' first and fourteenth amendment rights. Appendix at A461 (Amended Complaint). Plaintiffs seek: (1) a declaration that the PIRG funding scheme is unconstitutional; (2) an injunction against further disbursement of the mandatory PIRG fees; (3) an accounting and (4) restitution of sums previously collected.

On September 16, 1980, the district court denied plaintiffs' motion for class certification. Shortly thereafter, the defendants moved for summary judgment. The district court granted this motion, and the plaintiffs have appealed. We have jurisdiction pursuant to 28 U.S.C. §1291.

II

Initially we must address the question whether this case is now moot, inasmuch as the three plaintiffs have been graduated and the PIRG funding scheme was defeated in the most recent RUCCAS student referendum. *See* notes 1 & 4 *supra*. In letter briefs filed with the Court shortly before oral argument, both PIRG and the plaintiffs asserted that the case is not moot. We agree.

In *Finberg v. Sullivan*, 658 F.2d 93 (3d Cir. 1980) (in banc), we held that "[a] case may become moot if (1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have 'completely and irrevocably eradicated the effects of the alleged violation.' " 658 F.2d at 97-98

(footnote omitted) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). Under this standard, it is apparent that the present litigation has retained its vitality as a "case or controversy" for Article III purposes. While the three plaintiffs have been graduated and thus need not fear any future exactions of the PIRG fee, the past exactions of the fee have not been remedied and the relief sought has never been obtained. The fact that the plaintiffs have never sought a refund of their PIRG fees from the university does not compel a contrary conclusion; plaintiffs assert — and we agree — that under the circumstances alleged they constitutionally cannot be required to shoulder even the modest burden of requesting a refund. Aside, then, from plaintiffs' claim for injunctive relief — which, under present circumstances, has been mooted[8] — the cause of action thus remains unaffected by either the suspension of the PIRG fee or the graduation of the plaintiffs.[9]

III

We turn, then, to the merits of the case before us. Plaintiffs maintain that the PIRG funding system violates their right, established in *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977), not "to contribute

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8. We note that, should the district court conclude on remand that plaintiffs' motion for class certification should be granted, *see* note 16, *infra*, the presence of current RUCCAS students within the class arguably may revive the claim for injunctive relief. This could occur if the University reinstates the PIRG fee or if it is determined that the exaction of the fee is "capable of repetition, yet evading review." *See United States Parole Commission v. Geraghty*, 445 U.S. 388, 398-99 (1980).

9. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 216-17 n.9 (1977) (fact that collective bargaining agreement containing agency shop clause had expired did not render case moot, because some of the plaintiffs had either refused to pay service charge or had paid it under protest).

to the support of an ideological cause [they] may oppose as a condition of [attending the state university]." The mere fact that the PIRG fee is refundable does not, according to plaintiffs, cure the initial constitutional infirmity. Moreover, plaintiffs contend that the refund scheme itself is constitutionally deficient because it forces a dissenter to disclose his or her identity prior to receiving a refund. Finally, plaintiffs take issue with the district court's attempt to balance the free speech rights of the PIRG majority against the minority's right to dissent. Because we agree with plaintiffs' first two arguments — namely, that, at least for summary judgment purposes, the PIRG fee arrangement as described in the complaint offends the principles enunciated in *Abood*, and that the refundability feature of the funding scheme does not suffice to remedy the constitutional defect — we need not reach the other contentions presented by plaintiffs.

A

Our analysis begins with *Abood*. In that case, the Supreme Court considered the validity of a Michigan statute that permitted unions and local government employers to enter into "agency shop" arrangements under which even those employees who were not union members were required to pay the union a service fee equal to union dues. The Court held that such an assessment was constitutionally permissible only insofar as it was "used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment." 431 U.S. at 225-26. Observing that the first amendment is implicated in such circumstances — "An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative," *id.* at 222 — the Court concluded that any interference with the employees' associational rights was

"constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.* at 222.

The Justices, however, applied a different analysis to that portion of the union service fee used for political or ideological purposes unrelated to collective bargaining. Reasoning that compulsory political contributions "work[] no less an infringement of [the objecting employees'] constitutional rights" than do prohibitions against such contributions, *id.* at 234; *see Buckley v. Valeo*, 424 U.S. 1 (1976), and citing Thomas Jefferson's statement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical," 431 U.S. at 235 n.31, the Court held that to the extent the service fee was used for purely political purposes, it could be extracted only from those employees "who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 236.

Implicit in Justice Stewart's opinion in *Abood* is the recognition that, when the government impinges on an individual's associational rights — either by prohibiting or compelling association — such action cannot be sustained unless it is justified by a compelling governmental interest. As the plurality stated in *Elrod v. Burns*, 427 U.S. 347 (1976) (opinion of Brennan, J.), "[E]ncroachment [upon first amendment rights] 'cannot be justified upon a mere showing of a legitimate state interest.' . . . The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest."[10] *Id.* at 362

10. Justice Powell, concurring in the judgment in *Abood*, maintained that, by requiring the dissenter to step forward and declare his opposition to union activities, the Court had reversed this traditional first amendment principle. 431 U.S. at 263-64. While there may be considerable merit to Justice Powell's observation, we

(quoting *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). *See also Buckley v. Valeo*, 424 U.S. 1, 44 (1976) ("[T]he constitutionality of [the statute] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression"). In *Abood* itself, the national interest in labor peace, fostered by the collective bargaining process, was deemed sufficiently compelling to justify some intrusion on the employees' rights to associate. Extraneous activity in the political sphere, however, could not be so justified; thus, any political expenditures "not germane to [the union's] duties as collective-bargaining representative" could not be financed from fees paid by those who affirmatively objected to the union's ideological viewpoint. 431 U.S. at 235.

In the case at hand, the district court found it unnecessary to examine in any detail the university's proffered justification for its assessment of the mandatory PIRG fee. Rather, the court determined that the refundability feature of the financing arrangement was adequate to cure any constitutional defect that might otherwise exist. Because we conclude that the refund provision is *not* adequate in this regard, *see infra*, we are obliged to examine more closely the constitutional underpinnings of the PIRG funding scheme.

The university insists that, even without the refund mechanism, the mandatory fee at issue here is constitutionally justified because PIRG "makes a legislatively recognized educational contribution to the University and its students." Brief for Appellees at 24. We do not dispute the assertion that PIRG may enhance the education of some Rutgers students. Nonetheless, for purposes of the summary judgment motion here, we must

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do not read the *Abood* majority opinion as requiring any less than an initial showing, by the government, of the compelling reason why it has chosen to exact the compulsory fee in the first place.

assume that at least one of PIRG's functions is purely political, and noneducational, in nature. Indeed, plaintiffs allege that "[PIRG] is an organization founded for the primary purpose of advocating specific ideological and political positions before the Congress of the United States, the legislature of New Jersey, and the citizens of the state." Appendix at A991. While the district court stated that "PIRG is, in large measure, a student organization and . . . performs legitimate educational functions," 516 F. Supp. at 1147, it concluded, correctly, that "at least for purposes of the [summary judgment] motion, we must conclude that not all of PIRG's activities are truly educational or adequately linked to the University to survive the *Abood* standard." *Id.* at 1148.[11]

In holding, as we do, that — at least on the record before us — there is a genuine issue of material fact as to whether the exaction of the PIRG fee infringes upon the constitutional rights of plaintiffs, we do not mean to imply that all mandatory student fees can be invalidated on first amendment grounds. Indeed, a number of courts have held that a university's use of a mandatory (and nonrefundable) student fee to support politically active student organizations does not violate the first amendment. *See e.g., Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb.), *aff'd mem.* 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974). Admittedly, these cases antedate *Abood*, and thus their analysis may be challenged. That aside, however, we note that significant differences exist be-

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11. The district court also found that "PIRG has two basic goals. One is to effect social and political change in the areas of its concern. PIRG's second goal is to involve university students in public affairs so as to broaden their educational experiences and help develop a more sophisticated and active electorate." 516 F. Supp. at 1146.

tween those situations in which mandatory student fees were upheld, and the case presently before this Court.

In *Arrington*, for instance, the plaintiffs, students at the University of North Carolina, complained that their first amendment rights had been abridged because they were required to pay a "Student Activities Fee," a portion of which was used to support the university's daily newspaper. Plaintiffs disagreed with many of the editorial positions taken by the paper. The court found that the newspaper provided "a forum whereby differing views on controversial subjects are presented" and that "its most important function is to complement classroom education by exposing the student body to various points of view on significant issues." 380 F. Supp. at 1362-63. The paper "does not speak on behalf of a group with which the plaintiffs are identified. . . . There is no group, and plaintiffs have available an additional forum to express themselves in opposition to views set forth therein." *Id.* at 1362.

The *Arrington* court relied upon the reasoning employed in a similar case, *Veed v. Schwartzkopf, supra.* There, the court held that the use of mandatory student fees to subsidize the school newspaper, a student government association, and a guest speaker program, did not violate the first amendment. Stressing the judicial deference traditionally accorded university officials charged with the responsibility of devising educational programs, *Healy v. James*, 408 U.S. 169, 180 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), the court concluded that sponsoring programs that provide a forum for the expression of "widely divergent opinions on a number of topics" was well within the discretion of the university Board of Regents. That body "obviously has embraced an educational philosophy that the education of students extends beyond that which takes place in the classroom under the tutelage of instructors and professors." 353 F. Supp. at 152.

In contrast with the programs upheld in *Veed* and *Arrington*, PIRG does not provide a "forum" for the expression of differing views. Rather, PIRG's political stance is determined by its student Board of Directors, and students working for PIRG are foreclosed from supporting contrary positions unless such support is "okayed by the state board." Deposition of Edward Lloyd, Executive Director of New Jersey PIRG, Appendix at A621.[12] More important, PIRG — unlike the school newspaper under consideration in *Arrington* — is a "group"; the students who pay the PIRG fee are referred to in PIRG's literature as "constituents," Appendix at A699, and "members," Appendix at A754, A756. We note here that PIRG's ineligibility for student activity funds — precisely because of its independent status — distinguishes PIRG from the other groups on campus, which are funded by a standard "student activity fee." This fee, a lump sum used to subsidize a variety of student groups, can be perceived broadly as providing a "forum" for a diverse range of opinion. The PIRG fee, in contrast, was segregated from the other charges listed on the students' term bills, and provides support for only one organization.

To be sure, one by-product of PIRG is the education of its participants. But that end might also have been secured if the student-participants had worked for a political action group totally unconnected with RUCCAS, and yet it could not be seriously contended that student fees could be funneled to such a group. Put simply, the educational component of PIRG cannot serve to obscure the

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12. *See also* Appendix at A310 (deposition of plaintiff Joseph P. Galda):

> Q: Have you ever submitted a project proposal to your local board or to the State board or to any staff members of PIRG?
>
> A: I asked at the State headquarters one of the staff people if they would take a project by a pro-life group, and they said given the organization's feelings about abortion, they would not.

underlying substance of plaintiffs' complaint: that all RUCCAS students were obliged to finance what allegedly amounted not to a "classroom" to foster the effective presentation of the students' views, but rather to fund a political entity devoted to the attainment of certain fixed ideological objectives.

Although many student-related groups have ideological overtones, to the extent that the university determines that an organization is an appropriate participant in the total university forum, considerable deference should be accorded that judgment. This deference stems from the long-standing recognition that the university as a whole functions as a forum for the exchange of diverse views. As the Supreme Court has observed, "[t]he college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.' " *Healy v. James*, 408 U.S. 169, 180 (1972); *Widmar v. Vincent*, 102 S. Ct. 269, 273 n.5 (1981).[13] The holdings in *Veed* and *Arrington* thus correctly indicate that the university has broad latitude in providing an opportunity for students to participate in — and to oppose — the expression of a broad spectrum of ideology.

To overcome the presumptive validity of the university's judgment that an organization contributes to the university community, and to make out a prima facie case that exaction of the fee conflicts with the mandates of the first amendment, persons objecting to the fee must establish that the challenged group functions essentially as a political action group with only an incidental educational component. At that point the burden of

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13. *See also Good v. Associated Students of the University of Washington*, 86 Wash. 2d 94, 542 P.2d 762, 769 (1975) ("The cases which the university relies upon to sustain mandatory student fees recognize the delicate balance between the rights of the dissenters who must finance controversial programs and the desirability of the university providing a forum for wide-ranging ideas. Yet these cases are premised on the proposition that there must be in fact a spectrum presented, not a single track philosophy.").

producing evidence to counter the plaintiffs' showing or to otherwise demonstrate a compelling state interest shifts to the university. We do not rule out the possibility that, even in the face of an unrebutted prima facie showing, the university might demonstrate a compelling state interest by establishing the importance of the challenged group's contribution to the university forum.

In the present situation we must order a remand because the district judge did not have an opportunity to evaluate the plaintiffs' showing against the standards we have enunciated nor did the university have the opportunity to counter the plaintiffs' showing or otherwise set forth a compelling state interest.[14] And because differing inferences can be drawn from the existing record, there exists a genuine issue of material fact on the question whether the exaction of the PIRG fee infringes upon the first amendment rights of the plaintiffs. Given our conclusion in this regard, it is also necessary to consider whether PIRG's refund mechanism "cures" whatever infirmity might exist as the result of the compulsory exaction.

B

On appeal, plaintiffs argue that, under *Abood*, a refund arrangement does not suffice to remedy a constitutionally defective funding scheme; it simply serves to create "a perpetual system of violations and possible repayments, paid in again, establishing new violations." Brief for Appellants at 15-16.

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14. The funding mechanism for PIRG differs from the funding of groups supported in part by the general student activity fee which are more directly under the university's umbrella. We need not decide the significance of the difference in funding mechanism, at least in first amendment terms. It may be, however, that an exploration of university funding policy will demonstrate that funding by the standard university student activity fee justifies greater insulation from scrutiny.

Abood explicitly refrained from addressing the question whether a refund mechanism is sufficient to render constitutional a fee-collection arrangement such as the one at issue here.[15] Stating that, in fashioning a remedy, "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities," 431 U.S. at 237, the Court pointed with approval to the remedies discussed in two prior cases, *International Association of Machinists v. Street*, 367 U.S.740 (1961), and *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963). In *Street*, which established that "only employees who have affirmatively made known to the union their opposition to political uses of their funds are entitled to relief," 431 U.S. at 238, the Court outlined two possible remedies:

> first, "an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political

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15. In *Abood*, the union had adopted an internal union remedy subsequent to the onset of litigation. The plan, which provided that a dissenting employee may protest at the beginning of each school year the expenditure of any part of his agency-shop fee for political purposes, and then receive a pro rata refund, was not scrutinized by the court for constitutional infirmity:

> We express no view as to the constitutional sufficiency of the internal remedy described by the appellees. If the appellants initially resort to that remedy and ultimately conclude that it is constitutionally deficient in some respect, they would of course be entitled to judicial consideration of the adequacy of the remedy.

431 U.S. at 242 n.45.

> activities to the union's total budget"; and second, restitution of a fraction of union dues paid equal to the fraction of total union expenditures that were made for political purposes opposed by the employee.

Id. (quoting *Street*, 367 U.S. at 774-75). *Allen*, in contrast, intimated strongly that while a refund could cure past improper exactions of a fee, future exactions should be reduced, pro rata, prior to collection. There, the Court described a "practical decree" that could properly be entered, providing for: (1) the refund of a portion of the exacted funds in the proportion that union political expenditures bear to total union expenditures, and (2) *the reduction of future exactions by the same proportion.*

Abood, then, provides somewhat inconclusive authority in support of plaintiffs' position. Justice Stevens appears to have recognized as much; he concurred in the opinion of the Court but stressed that a refund very well might not be adequate: "the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing *a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.*" 431 U.S. at 244 (emphasis added).

A number of courts and commentators appear to agree with the observations by Justice Stevens that a funding system requiring continual payments and subsequent refunds to dissenters may not satisfy the requirements of the first amendment. In *KEPAC v. Kentucky Registry of Election Finance*, 110 L.R.R.M. 2398 (6th Cir. May 13, 1982), for example, the court approved a "reverse check-off" system in which employees, members of the Kentucky Education Association (KEA), had contributions to KEPAC, the political arm of KEA, deducted from their paychecks unless they affirmatively "checked off" that they declined to support KEPAC. If

an employee failed to check off, but subsequently decided not to participate in KEPAC, he could stop future deductions and receive a refund of past contributions. The fact that the employees could "check off" and thereby refuse to make donations to KEPAC in the first place was one factor that persuaded the court that the KEPAC funding scheme did not violate the rights of the dissenting members. 110 L.R.R.M. at 2404-05.

The *KEPAC* court compared the scheme at issue before it to that invalidated on statutory grounds in *Federal Election Commission v. National Education Association* (NEA), 457 F. Supp. 1102 (D.D.C. 1978), in which a $1.00 annual political contribution was automatically deducted from each NEA member's paycheck; if the member did not wish to contribute, he was required to "submit a separate written request for a refund rather than being able to disallow its deduction in the first place." *Id.* at 1103-04. This system, declared the District Court, placed an undue burden on the dissenting employees. Unlike *Abood* — in which "it was reasonable to put the burden on the dissenter to come forward" because the fee at issue was a lump sum payment used to cover both collective bargaining and political activities — in *NEA*, the $1.00 political payment was segregated from dues, and thus "there is no comparable justification for placing the burden on the dissenter." *Id.* at 1107 (footnote omitted).[16]

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16. *Cf. The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 198 (1977) (commentary on *Abood*) (footnotes omitted) (emphasis in original):

> The method proposed by the majority for preventing impermissible infringements of individuals' rights is fair to both the union and the employees. Since a dissenter need merely manifest his objection to nonbargaining expenditures of *any* kind, he is required to object only once in order to preserve his associational rights. He thus does not have to monitor every expenditure made during any given period, and need not express against his will his position on any particular cause that the

We need not decide today whether, in a situation identical to that in *Abood*, a refund mechanism would be sufficient to cure an otherwise unconstitutional fee assessment. For, like the $1.00 fee invalidated in *NEA*, the fee collection arrangement at issue here would appear to provide little justification for a refund procedure (as opposed to permitting dissenters to withhold payment from the start) than did the scheme in *Abood*. In that case, at least a portion of the compulsory union dues could be justified "by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222. Thus, it might be argued that a refund was the only administratively practicable method by which the dissenter's rights in *Abood* could be recognized. Here, however, for purposes of summary judgment, we are required to assume that no compelling governmental interest can be shown that justifies the assessment of any portion of the PIRG fee.[17] In the absence of such a demonstrated inter-

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NOTE — *(Continued)*

union advocates. In order to effectuate fully the goals underlying *Abood*, a court also should require the union to prepare a schedule of estimated yearly disbursements before collecting fees from nonunion members in the future and to make this schedule available for inspection by all employees. Such a requirement will allow disputes concerning the permissibility of any given expenditure to be resolved *before* an employee has parted with his money but will not impose any undue hardship upon the union. There will thus be more assurance that inertia will not persuade a dissenter to relinquish his constitutionally protected right to freedom of association.

17. The dissenters object to the *entire* fee; and under the University's refund system, the entire fee would have been returned to the dissenter upon request. We have been presented with no convincing reason — besides the obvious motive to procure additional funding from those students who do not wish to join PIRG but who are indifferent enough to forego seeking a refund — why PIRG could not obtain its financial support through purely voluntary contributions. In this regard, we perceive no constitutionally significant

est, a fee used to finance political activity cannot be exacted — even temporarily — from those unwilling to pay.[18]

IV

We hold, therefore, that the plaintiffs' allegations state a claim for relief under the first and fourteenth amendments. The judgment of the district court granting summary judgment for the defendants will be reversed and the case remanded for proceedings consistent with this opinion.[19]

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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distinction between a "check-off" system, in which the student states that he or she wishes to support PIRG, and a "reverse check-off" system, in which the student states that he or she declines to support PIRG.

18. The district court concluded that any constitutional difficulties arising from the PIRG assessment were "redeemed" by Rutger's "adequate" refund arrangement. Apparently, a requested refund was not forthcoming until the end of the semester in which the fee was paid; as a result, the fees collected in the fall semester allegedly were not returned until after the fees had been paid for the spring term. Thus, according to the plaintiffs, PIRG had the use of every student's money for virtually the entire school year. While this contention may have considerable merit, we of course need not consider it, given that we have concluded that even a temporary exaction of the PIRG fee from Rutgers' students cannot be justified on the present record.

19. On remand the district court may wish to reconsider plaintiffs' motion to compel discovery, as well as the district court's order denying plaintiffs motion for class certification *See* Herbert B. Newberg, *Class Actions*, Ch. 3, §1120h (1977).

RECEIVED AND FILED
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Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5498

JOSEPH P. GALDA, PAUL EWERT, KRISTINA FARROW CYPEL, THOMAS H. ODOM, JOSEPH RANDALL CORMAN, LORI KEELEY, LESLIE BEEBE, LEONARD SCOTT KELTER, EDWARD D. WICKHAM, and CHRISTOPHER LEPRE, Individually, and upon behalf of all others similarly situated,

Appellants

v.

RUTGERS, The State University of New Jersey, DR. EDWARD J. BLOUSTEIN, Individually, and as President of Rutgers, The State University of New Jersey, DR. NORMAN REITMAN, Individually, and as Chairman of the Board of Governors of Rutgers, The State University of New Jersey, DONALD S. MACNAUGHTON, DAVID A. WERBLIN, KATHERINE ELKUS WHITE, DONALD M. DICKERSON, SANFORD M. JAFFE, ROBERT KAPLAN, EDWARD KRAMER, LINDA STAMATO, ROBERT J. TORRICELLI, MARY WHITE BELL, as members of the Board of Governors of Rutgers, The State University of New Jersey, and WALTER K. GORDON, Individually and as Dean of Rutgers Camden College of Arts and Sciences

The New Jersey Public Interest Research Group, Inc.,

Intervenor

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 79-2811)

Before: ADAMS, WEIS, and WISDOM,* *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel February 26, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 20, 1984, be, and the same is hereby vacated and the cause remanded to the said District Court for entry of an order enjoining mandatory assessment of the mandatory fee payable to PIRG.

ATTEST:
/s/ Sally Mrvos
Clerk

August 28, 1985

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* The Honorable John Minor Wisdom, Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Entered: October 11, 1985]

No. 84-5498

JOSEPH P. GALDA, et al.
Appellants

v.

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY, et al.,
Appellees

NEW JERSEY PUBLIC INTEREST
RESEARCH GROUP, INC.,
Intervenor-Appellees
(D.C. Civil No. 79-2811)

SUR PETITION FOR REHEARING

Present: HUNTER, WEIS, HIGGINBOTHAM, SLOVITER, STAPLETON, MANSMANN, and WISDOM*, *Circuit Judges.*

The petition for rehearing filed by appellees and intervenor-appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams and Becker would grant rehearing.

* Honorable John Minor Wisdom, Circuit Judge. United States Court of Appeals for the Fifth Circuit, sitting by designation.

Chief Judge Aldisert and Judges Seitz, Gibbons and Garth did not participate in the consideration of this matter.

BY THE COURT,

/s/Weis
Circuit Judge

DATED: October 11, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSEPH P. GALDA, et al., Plaintiffs, v. RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, et al., Defendants, NEW JERSEY PUBLIC INTEREST RESEARCH GROUP, INC., Defendant-Intervenor.	:	Civil Action No. 79-2811 **ORIGINAL FILED** JUN 20, 1984 ALLYN Z. LITE, CLERK FINDINGS OF FACT AND CONCLUSIONS OF LAW

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BROTMAN, District Judge

This action is brought by nine students at Rutgers, The State University of New Jersey ("Rutgers"), challenging the constitutionality of the current funding system at Rutgers of the New Jersey Public Interest Research Group, Inc. ("PIRG"). Plaintiffs allege that their First and Fourteenth Amendment rights are violated by the exaction of a refundable fee by the University to support PIRG. After conducting an extensive nonjury trial the court finds that plaintiffs have failed to rebut the presumptive validity of the University's judgment that PIRG contributes educationally to the university community. The court therefore finds that plaintiffs have failed to make out a prima facie case that the exaction of the fee conflicts with the mandates of the First Amendment.

BACKGROUND

This action was originally instituted in September 1979 by three students enrolled at Rutgers Camden College of Arts and Sciences. The plaintiffs filed suit against Rutgers under 42 U.S.C. § 1983, alleging that university officers and administrators were violating plaintiffs' rights under the First Amendment[1] by exacting with each semester's bill a refundable fee to support PIRG, a non-profit, non-partisan, student-run corporation engaged in research, lobbying and advocacy for social change.

In 1981, this court granted defendants' motion for summary judgment. *Galda v. Bloustein*, 516 F.Supp. 1142 (D.N.J.1981). It found, *inter alia*, that the presence of a refund procedure for students not wishing to support PIRG preserved the constitutionality of the funding policy. The plaintiffs appealed this decision.

On appeal, the Third Circuit Court of Appeals reversed this court's grant of summary judgment and remanded the case for a

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[1] The First Amendment is applicable to state action by way of its incorporation through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). For ease of discussion, the court will refer to the First Amendment in this opinion with the understanding that it is applicable only through its incorporation into the Fourteenth Amendment.

trial. *Galda v. Bloustein*, 686 F.2d 159 (3rd Cir.1982). The Third Circuit reasoned that on the record before it there existed a genuine issue of material fact as to whether the exaction of the PIRG fee infringed upon the plaintiffs' constitutional rights. 686 F.2d at 165. The court initially noted that Rutgers had determined that PIRG was educationally valuable and stressed that "considerable deference" must be accorded to the University's determination that "an organization [such as PIRG] is an appropriate participant in the total university forum." *Id.* at 166.[2] The circuit court held, however, that the University's judgment about the educational value of PIRG to the university community was not absolutely immune from judicial scrutiny. The court ruled that a more complete factual record was needed as to the nature of PIRG and its contribution to the university forum and outlined the following test:

> To overcome the presumptive validity of the university's judgment that an organization contributes to the university community, and to make out a prima facie case that exaction of the fee conflicts with the mandates of the first amendment, persons objecting to the fee must establish that the challenged group functions essentially as a political action group with only an incidental educational component.

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[2] The court went on to state that

> This deference stems from the long-standing recognition that the university as a whole functions as a forum for the exchange of diverse views. As the Supreme Court observed, "[T]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'" *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266 (1972); *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 273 n. 5, 70 L.Ed.2d 440 (1981). The holdings in [*Veed v. Schwartzkopf*, 353 F.Supp. 149 (D.Neb.), *aff'd mem.*, 478 F.2d 1407 (8th Circ.1973), *cert. denied*, 414 U.S. 1135, 94 S.Ct. 878, 38 L.Ed.2d 760 (1974)] and [*Arrington v. Taylor*, 380 F.Supp. 1348 (M.D. N.C.1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975) *cert. denied*, 424 U.S. 913, 96 S.Ct. 1111, 47 L.Ed.2d 317 (1976)] thus correctly indicate that the university has broad latitude in providing an opportunity for students to participate in—and to oppose—expression of a broad spectrum of ideology.

Galda, supra, 686 F.2d at 166 (footnote omitted). *Accord, Kania v. Fordham*, 702 F.2d 475 (4th Cir.1983) (courts should defer to the academic judgments of university administrators).

> At that point the burden of producing evidence to counter the plaintiff's showing or to otherwise demonstrate a compelling state interest shifts to the university. We do not rule out the possibility that, even in the face of an unrebutted prima facie showing, the university might demonstrate a compelling state interest by establishing the importance of the challenged groups contribution to the university forum.

Id. at 166-67.[3] The circuit court ordered a remand because this court "did not have an opportunity to evaluate the plaintiffs' showing against the standards we have enunciated nor did the university have the opportunity to counter the plaintiffs' showing or otherwise set forth a compelling state interest." *Id.* at 167.

Pursuant to the mandate on remand, this court conducted a ten-day trial at which past and present members of the Rutgers community appeared and testified about PIRG and its contributions to Rutgers. Dr. Edward Bloustein, President of Rutgers, testified at length about the creating of the funding mechanism of PIRG and his view of PIRG's contribution to the university community. Eminent experts in political science, education and university administration appeared and testified about PIRG at Rutgers and about the PIRGs at other institutions of higher learning around the country.

The court's findings focus on the creation and nature of the current funding mechanism for PIRG at Rutgers; the organizational structure of PIRG; the scope of PIRG's activities; the experiences of Rutgers faculty and students with PIRG; and the opinions of experts about the educational value of PIRG and its contribution to the university community. The court does *not* attempt to restate all of the information presented at trial, but instead focuses on the framework discussed above to reach a reasoned conclusion as to whether plaintiffs' constitutional rights have been violated by defendants' actions.

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[3] The court also ruled that a refund to dissenters would not in itself preserve the constitutionality of the funding mechanism if the initial payment of the fee violated plaintiffs' constitutional rights. *Galda, supra,* 686 F.2d at 167-69.

FINDINGS OF FACT

A. The Parties

1. The plaintiffs in this action are nine individual students at the various constituent campuses at Rutgers, the State University of New Jersey. The p[illegible]ve stipulated that each plaintiff finds positions taken b[illegible] objectionable[4] (Joint Stipulation ("Stipulation") 3). Each plaintiff paid the refundable PIRG fee for one or more semesters during which he or she was a student at Rutgers (Stipulation 2).

2. This suit was filed naming as defendants officers and administrators of Rutgers. For purposes of this action only, the parties have agreed that action taken by Rutgers is state action (Stipulation 5). Shortly after the lawsuit was filed, PIRG intervened as a defendant and has since then actively participated as a party in this case.

B. The Creation of the Special Funding System at Rutgers

3. The overwhelming majority of student organizations at Rutgers are funded through a mandatory, non-refundable student activities fee assessed against students each semester (Joint Exhibit ("Exhibit") 379; (Tr. VI, 30-33)). The apportionment of this student activities fee for student organizations is determined by a relatively small group of students on a student fee board (Tr. VI, 46). Students in general have no opportunity to vote on the specific apportionment of this mandatory fee among student groups at Rutgers (Tr. VI, 45-47).

4. Many of the student organizations funded through the mandatory, non-refundable student activities fee take positions on political and social issues (Tr. VI, 32-33). Such groups include the American Civil Liberties Union, the Jewish Awareness Club, the National Association for the Advancement of Colored People and the Gay Alliance, an organization which advocates the rights

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[4] The court notes, however, that only two of the seven plaintiffs who appeared and testified at trial named positions taken by PIRG with which they disagreed (Tr. I, 82, 122). One of the other five plaintiffs who appeared quite candidly testified that she became a plaintiff in this action at the request of plaintiff Joseph Galda and does not know any positions taken by PIRG (Tr. I, 86-87).

of homosexuals (Tr. I, 48; Tr. V, 70-72; Tr. VI, 33-35; Exhibit 379). Also funded through the non-refundable student activities fee is the Rutgers University Legislative Action Committee ("RULAC"), a group which takes positions on issues of social importance and lobbies to further its positions before legislators in Trenton, New Jersey and Washington, D.C. (Tr. VI, 69-71). Rutgers further allows student groups such as the College Republicans to use the facilities of the University (Tr. I, 148-49).

5. Dr. Edward Bloustein, the President of Rutgers and an expert in college level education and university administration, strongly supports the presence of these groups of the campuses of Rutgers because they create the "widest possible forum for the interchange of views in the University community" (Tr. VI, 37).[5]

6. In 1971 a group of students approached Dr. Bloustein and asked him to create a new funding mechanism to support a public interest research group (a "PIRG") at Rutgers (Tr. VI, 17; Exhibits 6, 169, 170). The students had collected thousands of signatures on petitions in support of their proposal (Tr. VI, 116-25). Under the students' proposal, the University would assess a refundable fee of $1.50 to support the proposed PIRG with each semester's tuition bill (Exhibit 6). The PIRG proposed by the students was ineligible for funding from the general student activities fee because it was to be a student-run corporation independent of the University (Tr. VI, 88).

7. Under the students' proposal, PIRG was to be a non-partisan, non-profit corporation which would research and lobby for social change (Exhibit 6). Similar proposals for PIRGs were introduced in the early 1970s in other universities around the country (Tr. VI, 174 (University of Minnesota); Tr. VII, 89-93

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[5] Dr. Bloustein further testified as follows:

> I know of no university which doesn't have such a system of clubs and activities and I know of none of my colleagues, and I meet them regularly, who would not say that this is a very strong adjunct of the success of any university. Indeed, I have been a student at [at] least four universities in my time, from Oxford University to Cornell to N.Y.U. I've taught in one or two others. In every one . . I have been near, student activities of this sort are considered valuable to the edu. .onal experience.

(Tr. VI, 37).

(University of Massachusetts); Tr. X, 86 (Queens College); Tr. X, 94 (Bennington College)).

8. PIRGs were initially welcomed by university administrators among other reasons because they were a vehicle for students to develop and further their political and social beliefs in a socially acceptable manner (Tr. VI, 23; Tr. VII, 92-93; Tr. X, 89). PIRGs developed nationally shortly after the height of student unrest stemming from American involvement in the Vietnam war (Tr. VII. 92-93). The proposed structure of PIRGs was suggested by Ralph Nader and Donald Ross in their book "Action For a Change," published in 1972 (Exhibit 165; Tr. VI, 22-23).

9. As noted above (Finding No. 6), the students' proposal to Dr. Bloustein was for a specialized funding procedure which would be unique for PIRG (*see* Exhibits 6, 169). The Rutgers administration rejected the students' proposal, reasoning (a) that the University administration did not directly authorize funds for any specific activity (Tr. VI, 18); and (b) because it believed that a broad and neutral funding policy for groups outside the mandatory student activities fee would better encourage a broad forum for the expression of diverse student viewpoints (*Id.*).

10. The Rutgers University Board of Governors ultimately enacted such a neutral funding policy, which was originally proposed by Dr. Bloustein (Tr. VI, 18) and is set forth in the margin in its entirety as amended in 1973.[6] Two key eligibility requirements were established by the University in its neutral funding policy.

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[6] The funding policy provides as follows:

The following is a statement of University policy regarding the funding of student sponsored programs and organizations which are not legally eligible to receive funds from student activity fee accounts.

(1) Each organization is required to present its program and plans for concept review to the University Senate for recommendation to the President.

(2) If approved, the organization shall seek college referenda on the issue of student funding support for their program. At least fifty per cent of the student body of each division of the University shall be required to participate in such referenda and a majority of those voting must approve the project in order for implementation within that division. As an alternate, an affirmative vote of twenty-five per cent of the student body plus one shall be adequate to meet this test.

a. The activity funded must have significant educational value. The educational value of any proposed activity is scrutinized by the University President and by the University Senate, an advisory body composed of administrators, faculty and students (Tr. VI, 12). Any group hoping to be funded through the neutral funding policy must present a "concept plan" to the President and University Senate at the time the proposal is initially made and every three years thereafter, if funding is approved.

b. After the concept plan is approved for its educational value, the organization seeking funding must demonstrate widespread student support by attaining a minimum affirmative vote of 25% plus one of all students eligible to vote. PIRG must also receive a majority of those actually voting. Referenda must be held every three years after initial approval of funding is approved by the students. At each referendum, students are free to campaign for and against the groups seeking to participate in the special funding program (Tr. IX, 67-69). Twenty-five percent of the student body was viewed as an extremely stringent requirement, as the general turnout at student elections at Rutgers is only ten to fifteen percent of the student body (Tr. VI, 24).

11. The Senate Education Policy Planning Committee endorsed the neutral funding mechanism described above. It felt that the funding system and its operation in practice would be a valuable adjunct to the educational opportunities available at Rutgers (Tr. VI, 20-21). Dr. Bloustein concurred with this judgment at the time the policy was passed by the University and reiterated his belief at trial that the funding mechanism in itself is educational (Tr. VI, 22-24, 45-47).

(3) The organization shall then be listed on the University term bill with payment of the indicated fee mandatory. A postcard asking for a refund shall be included along with the term bill which shall be sent by the individual student to the organization and which shall send the refund directly to the student.

(4) Each organization so funded shall be expected to defray the University cost of administration of the fee collection.

(5) Each organization shall be required every three years to meet the tests defined under items #1 and #2 above in order to continue to receive funds under this policy and procedure.

12. The University's position about the educational value of the neutral funding system is based on several considerations:

a. The funding procedure requires the funded group to regularly "meet its constituency" to seek their approval through the periodic referenda (Tr. VI, 23). Dr. Bloustein believes there is "great educational value" in the process of having students publicly campaign to win the support of fellow students whom they purport to represent (Tr. VI, 23-24). The experience of advocating one's position in the referendum process forces proponents of PIRG to learn their opponents' arguments in order to rebut them, in itself an educational introduction to the political process (Tr. VI, 45, 57).

b. The referendum procedure encourages diversity at Rugers, since it provides a freer forum for a wider expression of student opinion than the student fee boards used to disperse the mandatory student activities fee (Tr. VI, 46). The process is more "democratic" than the existing funding of student activities (Tr. VI, 47), in that it broadens the range of organizations funded with student fees (Tr. VI, 46-47). Moreover, the funding procedure is controlled by the general student population and is therefore independent of the sometimes acrimonious disputes of the student fee board as to the appropriate disbursement of student fees (Tr. VI, 49).

13. Following the enactment of the neutral funding mechanism by the Rutgers Board of Governors, PIRG campaigned for and won student referenda at several Rutgers campuses (Exhibit 17). PIRG has operated continuously at Rutgers since 1972, essentially supported by the refundable student fee (Stipulation 8; Tr. III, 170). Rutgers has facilitated the collection and transfer to PIRG of a total of over $800,000 over the past twelve years (Tr. II, 109).

14. The PIRG fee was originally $1.50 per semester per student. The fee approved in the most recent student referenda is $3.50 per semester (Stipulation 12). PIRG has complied with the requirements of the University's funding policy by submitting a

"concept plan" and winning the approval of the university administration every three years since 1972 (Tr. VI, 54; Exhibit 171 (1975); Exhibit 178 (1978); Exhibit 184 (1981)). Rutgers President Bloustein firmly believes that PIRG has a valuable educational purpose and functions only incidentally as a political group (Tr. VI, 54-55, 66-68).

15. The special funding policy is neutral and is not limited to the funding of PIRG. *The Daily Targum*, the undergraduate newspaper at Rutgers' New Brunswick campus, has obtained student fees pursuant to the funding policy since 1980 (Stipulation 11; Tr. IX, 71). The *Targum* takes editorial positions on political issues (Tr. VI, 48-49) and endorses candidates running for elective public office (Tr. VI, 49-52).

16. PIRG generally wins overwhelming margins in the funding referenda, sometimes as much as 90% of the votes cast (Tr. IX, 67); Exhibit 393 (referenda results collected)). At the time of trial, PIRG fees were being collected from students at the following constituent campuses of Rutgers: Cook College, Douglass College, Rutgers Law School/Camden, Rutgers Law School/Newark, and Rutgers College at New Brunswick (Tr. IX, 94). PIRG fee referenda have recently failed to attain the minimum vote required for funding at Rutgers' other two campuses, Livingston College and the Rutgers Camden College of Arts and Sciences (Tr. IX, 64-65). The defendants have informed the court that after the trial in this action a PIRG referendum passed in the Spring of 1984 at Livingston College, leaving Rutgers-Camden as the only Rutgers campus where students have not approved the funding mechanism for PIRG (Galligan Affidavit, ¶¶ 4-5).

17. The refundable student fee for PIRG is named as a separate line item on students' bills each semester (Exhibits 1, 2 and 3). Rutgers describes the fee as mandatory (Stipulation 6), but does not sanction students who refuse to pay the fee (Tr. VI, 27; Tr. IX, 77). Approximately three to five percent of the students who have paid the PIRG fee request a refund from the University of their PIRG fee (Tr. IX, 81).

18. A leaflet that describes PIRG, its activities and the refund

procedure is enclosed with each term bill (Stipulation 13; Exhibit 4). The back of that leaflet contains a form which those students desiring a refund must complete and submit to PIRG (Stipulation 14). PIRG staff members keep confidential the names of those students seeking refunds of their PIRG fees (Tr. IX, 85). The refund form does not ask for any explanation or statement or reasons for the refund request (Stipulation 15). No plaintiff is aware of any incident in which any Rutgers student has been discouraged by Rutgers, by PIRG, or by any other person or organization, from requesting a refund of the PIRG fee (Stipulation 16). No plaintiff is aware of any incident in which any Rutgers student has been subjected to any type of reprisal or punishment for requesting or receiving a refund of the PIRG fee (Supplemental Stipulation).

19. When PIRG receives the refund forms, it contacts Rutgers to determine whether the students seeking refunds have in fact paid the PIRG fee (Tr. IX, 76). After PIRG receives this verification from Rutgers, it sends out refund checks to the students who have requested them (Tr. IX, 78). Refunds are generally sent out in the latter part of the semester in which students have paid the fee (Tr. IX, 76-80).

20. At the beginning of each semester, Rutgers pays an advance to PIRG up to ninety percent of the funds collected for PIRG from students upon registration (Tr. IX, 79). The University deducts from the amount sent to PIRG its expenses in administering the funding system, which ranges from $2,000—$3,000 per semester (Tr. IX, 80). At the end of each semester, Rutgers pays PIRG the balance of the PIRG fees collected for which no refunds were given (Tr. IX, 79). Students who have requested and received refunds of their PIRG fees are still free to participate in the activities of PIRG (Tr. IX, 75).

C. The Organizational Structure of PIRG

21. PIRG is governed by students elected by their peers to serve as members of PIRG boards of directors at the local (campus) and state levels (Tr. V, 167; Exhibit 94 (organizational flowchart of PIRG)). The local boards of directors are responsible

for PIRG activities on each constituent campus of Rutgers (*Id.*; Tr. IX, 12-13). Local board members elect the members of the state board of PIRG which ultimately governs the organization, sets policy and chooses the projects and activities in which PIRG becomes involved (Tr. V, 167; Tr. VIII, 61-68). The representation of each Rutgers campus on the PIRG state Board of Directors is proportionate to the relative sizes of the constituent campuses (Tr. V, 167-68).

22. The PIRG state Board of Directors, composed entirely of students, elects one of its members to serve as the state chairperson of PIRG (Tr. VIII, 61). The chairperson, among other duties, runs monthly meetings, oversees the PIRG support staff, proposes agendas, and supervises numerous PIRG committees, which include a hiring committee, a projects committee and a finance committee (Tr. VIII, 63). He or she acts as the liaison from PIRG to other groups and organizations within the University and as a general spokesperson for PIRG (Tr. VIII, 81).

23. The state Board of Directors is solely responsible for the selection of PIRG's activities (Tr. VIII, 64, 68). Any student at Rutgers, whether or not active in PIRG, may submit suggested projects for PIRG to the consideration of PIRG's board of directors (Tr. VIII, 63). Among the factors relied upon by the students in selecting projects for PIRG are (a) whether there is adequate student interest in the proposed project; (b) whether the resources of PIRG could support the project; (c) whether PIRG staff members or students had expertise in the area; (d) what sort of end result would arise from the project (e.g., a pamphlet or publication); (e) the amount of time a project would consume; and (f) the need in the community for the project (Tr. VIII, 64). The projects and positions of PIRG are selected annually by the students governing the organization (Tr. VI, 113: "We are not bound by what was done in previous years nor do we bind the next State Board" (Angela Dileo, former PIRG chairperson)).

24. The PIRG board of directors has the responsibility of hiring and firing the executive director of PIRG (Tr. V, 177). The executive director is selected by the state Board of Directors after

applicants are interviewed and screened by a Hiring Committee composed of members of the board (Tr. V, 179-80).

25. The executive director of PIRG is the salaried supervisor of the PIRG staff who oversees PIRG's activities on a day-to-day basis (Tr. V, 177-78). In addition to the executive director, who is a full-time employee of PIRG, there are six other full-time employees and one part-time employee of the organization who work with Rutgers students to implement PIRG policies and supervise PIRG internships (Tr. V, 183). These other employees include coordinators of PIRG activities on the constituent campuses, an administrative director, a part-time attorney and an outreach director who coordinates PIRG's relations with citizens in the community (Tr. V, 183-84). PIRG's organizational structure is detailed in Exhibit 94 (*see also* Tr. IX, 19-20).

26. Students active in the governance of PIRG testified that their governance activities and responsibilities have in themselves been educational, in that they learn leadership and organizational skills, group dynamics and communications skills, technical writing and public speaking (Tr. V, 186; Tr. VIII, 68-69; Tr. IX, 14). One former PIRG leader emphasized that PIRG activities helped her develop feelings about the importance of citizenship and an individual's responsibility to contribute to society. (Tr. V, 187).

27. The paid staff of PIRG advise the students and assist in the development and execution of PIRG projects, but exercise no vote on the PIRG boards of directors (Tr. V, 168-74; Tr. IX, 18, 25).

28. For several years of its existence, ending in July 1981, PIRG employed a legislative director to lobby in support of positions taken by the PIRG state Board of Directors (Tr. IX, 21, 44). PIRG does not currently employ a legislative director (Tr. IX, 21).

29. PIRG's activities are predominantly undertaken by student interns at the constitutent campuses of Rutgers (Tr. IX, 23). Many students choose to intern at PIRG for academic credit or in conjunction with their classwork (Tr. IX, 23-24; *see also infra* Finding No. 36). Other students volunteer their time to assist with PIRG projects (Tr. IX, 25). Hundreds of students at Rutgers have participated in PIRG's activities (Tr. VIII, 11; Tr. IX, 23-24; Exhibit 182 at pp. 22-27).

30. Those students interning with PIRG for academic credit can arrange for such credit by designing a research project and asking a member of the Rutgers faculty to approve and supervise their activities. (Tr. IX, 24). Individual faculty members decide what individual work is to be required of PIRG interns, and faculty members award grades to the students at the conclusions of their internships (Tr. VII, 157-59; Tr. VIII, 44). PIRG staff members communicate with the supervising faculty members in order to inform the faculty of the activities of their students who are working with PIRG (Tr. VII, 162-63). PIRG staff members meet with PIRG interns on at least a weekly basis and provide faculty members with evaluations of the students' work at PIRG (Tr. IX, 24).

D. The Scope of PIRG's Activities

31. PIRG's Goals are as follows:

> a. to engage in non-partisan analysis, study and research of such issues as urban revitalization, consumer protection, resource planning, urban and rural occupational safety and labor conditions, protection of natural areas and environmental quality, racial and sexual discrimination, landlord-tenant relations, delivery of health care and similar matters of urgent or long-range concern to the general welfare of the people of the State of New Jersey.
>
> b. to make available to the public at all times a full and fair exposition of the pertinent facts and results of such non-partisan analysis, study and research so that citizens may form independent conclusions beneficial to the community.

Exhibit 91 (PIRG's Articles of Incorporation).

32. As noted above (Finding No. 23), the activities undertaken by PIRG are individually selected by the PIRG state Board of Directors, consisting entirely of students from the constituent campuses of Rutgers. Copious evidence in the form of exhibits and testimony was introduced at trial about the scope of PIRG's activities.

33. The following Findings describe PIRG's activities at Rutgers. This is not by any means an exhaustive statement of

those activities, but is an accurate reflection of the breadth of the projects undertaken by PIRG in recent years.

a. PIRG sponsors debates, lectures and public fora on matters of public interest and concern (Tr. V, 57; Tr. IX, 25). The subjects of these functions have included such issues as education and tuition policy (Tr. IX, 27), decision making in the energy field (Tr. IX, 26), and the Equal Rights Amendment (Tr. V, 160).

b. Students and staff at PIRG have written, published and disseminated informational pamphlets and consumer guides on a wide variety of topics (Tr. IX, 27). These have included publications on the competency and honesty of local service stations (Exhibit 399), financial aid (Exhibit 402), tenants' rights (Exhibit 403), the transportation system at the New Brunswick campus of Rutgers (Exhibit 404), the Federal Water Pollution Control Act (Exhibit 409), banking services in New Brunswick (Exhibit 410), hospital emergency rooms and squads (Exhibit 412), general consumer guides (Exhibits 413 and 415), solar energy (Exhibit 414) and fuel costs (Exhibit 419). These exhibits represent only those PIRG research projects that have ultimately resulted in formal published pamphlets and guides. Other research papers done by students working with PIRG include reports on such topics as higher education, water conservation and New Jersey's oil spill program (Tr. IX, 40-41).

c. PIRG's single largest project at Rutgers has been the Clean Water Action Project, which constitutes approximately forty percent of PIRG's work at Rutgers (Tr. IX, 30-31). There exists a strong interest at PIRG in environmental matters partly because Cook College, one of Rutgers' constituent campuses, emphasizes environmental studies, and also because New Jersey itself often faces serious environmental problems (Tr. IX, 31). A major component of the Clean Water Action Project is "streamwalking," a program wherein PIRG students wade in boots through streams attempting through scientific testing to discover hidden illegal sources of pollution into New

Jersey's fresh water systems (Tr. V, 152-53; Tr. VII, 63-64; Exhibits 327-31). PIRG students frequently find such illicit pollution discharge points (Tr. VII, 64), mark the spot on a regional map, and notify the United States Environmental Protection Agency of the violations (Tr. VII, 63).

d. Another major area of involvement for PIRG is consumer protection (Tr. IX, 31; *e.g.*, Exhibit 413). PIRG has published many consumer informational pamphlets, ran a consumer hotline and published a directory of social services (Tr. IX, 31-32).

e. Some other major areas of PIRG's work include energy conservation (Tr. IX, 33-34; Exhibits 417-18), tuition policy and financial aid (Tr. IX, 34), tenant's rights (Tr. IX, 35) and women's rights (*Id.*).

f. PIRG staff and students sometimes publicly lobby to further the positions taken by the PIRG board of directors (Tr. III, 162-63; VI, 110-11; Tr. IX, 27-28, 49). PIRG staff and students have lobbied individual state legislators and appeared and testified before legislative committees in Trenton, New Jersey (Tr. IX, 49-50). Edward Lloyd, the executive director of PIRG from 1978 through 1983 estimates that he spent at most about fifteen percent of his time in legislative activities (Tr. IX, 45-46).[7] PIRG's campus coordinators also occasionally lobby to further the positions taken by PIRG (Tr. IX, 48). PIRG's staff attorney has sometimes represented PIRG in litigation assisted by Rutgers law students in clinical programs or internships (Tr. IX, 28).

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[7] The court notes the testimony of Harold Bozarth, a chemical industry lobbyist who testified that Mr. Lloyd attends legislative sessions nearly every day when the legislature is in session (Tr. II, 16). Lloyd was asked about Bozarth's testimony (Tr. IX, 46). He explained that PIRG and the chemical industry took adverse positions on a recently enacted "right to know" bill affecting the chemical industry (*Id*). Lloyd speculated that since he and Bozarth frequented the same legislative committee meetings for that bill, Bozarth was under the mistaken impression that Lloyd was constantly in attendance at the state legislature (*Id.*).

g. PIRG has sometimes lobbied in coalition with other student groups on issues of common interest (Tr. IX, 50-52). The other groups include the Rutgers University Legislative Action Committee and the New Jersey Student's Association, groups funded by Rutgers students through the mandatory, non-refundable student activities fee (Tr. IX, 52). PIRG sometimes takes positions opposed to the positions taken by Rutgers (Tr. IX, 53).

34. The plaintiffs in this action retained Irving B. Ross, a certified public accountant, to analyze PIRG's financial records (Tr. II, 71-179). After reviewing those records in detail, he was unable to quantify the expenditures of PIRG in terms of "political" expenditures and "educational" expenditures (Tr. II, 80). He could not do so because PIRG's financial documents did not break down its activities into these categories, and the underlying records of the organization did not contain data adequate for him to make such a distinction (Tr. II, 79-109). The court's independent review of PIRG's financial documents confirms that it is impossible from these records to numerically quantify "political" and "educational" components of PIRG (*e.g.*, Exhibits 100-161).

E. The Experiences with PIRG of Rutgers Faculty and Students

35. At trial past and present Rutgers faculty and students appeared to testify about their experiences with PIRG, and about whether they believe that PIRG contributes educationally to the university community and whether it specifically contributed to their educational experiences at Rutgers. All of these witnesses, whose testimony is briefly summarized below, were called by the defendants. The plaintiffs called no Rutgers faculty or students to rebut the testimony of these witnesses that PIRG's presence at Rutgers significantly enhances the educational opportunities available to faculty and students at the University.

36. The past and present Rutgers students who testified included both students who held leadership positions within PIRG and those who were more casually involved in the organization,

primarily as interns working under the auspices of a member of the Rutgers faculty. These students testified that they have derived significant educational benefits from their association with PIRG.

a. Angela Dileo is currently a senior at Rutgers College (Tr. V, 159). She has participated in three Rutgers internships, including a study of the way New Jersey was handling its oil pollution problems in comparison with seven other states (Tr. V, 161), an extensive project which lasted nine or ten months (Tr. V, 164). She testified that working with PIRG improved her organizational and writing skills, taught her to deal with a bureaucracy, to use a law library and about oil pollution, the subject matter of her internship (Tr. V, 164-65). She also served as a member of the local and state PIRG boards of directors and has recently completed a term as the chairperson of PIRG's state Board of Directors (Tr. V, 171). She testified that her leadership roles in PIRG have in themselves been educationally valuable, teaching her organizational and analytical skills, technical writing, public speaking and the importance of citizenship and participation in public life (Tr. V, 186-87).

b. William Potter is a 1973 graduate of Rutgers Law School in Newark (Tr. VI, 116) and is currently the Assistant Commissioner of the Department of the Public Advocate of New Jersey (Tr. VI, 114). He was active in the formation of PIRG and the presentation of the original funding proposal to the Rutgers administration (Tr. VI, 118-36). He testified that his experience with PIRG helped him choose a public service career, introduced him to legal advocacy, and taught him to effectively advocate his positions in writing (Tr. VI, 138).

c. Janine Beer is a 1983 graduate of Rutgers College who served as state chairman of PIRG while she was an undergraduate (Tr. VIII, 61). Her experience with PIRG taught her organizational and administrative skills, developed her public speaking skills, and introduced her to the substantive areas which were the subjects of her research at PIRG (Tr. VIII, 69).

d. John Malleck is a 1976 graduate of Rutgers who was active as an undergraduate in PIRG's Clean Water Action Project (Tr. VII, 57). Through PIRG he learned about bureaucracy and the federal government and developed organizational and group management skills (Tr. VII, 70). He is currently employed at the United States Environmental Protection Agency and believes that his background in environmental work at PIRG helped him choose his career as an environmentalist and helped him get his current job at the E.P.A. (Tr. VII, 70-71).

e. Stuart Brown is a Rutgers graduate who is now the Acting Director of Student Activities at Barnard College (Tr. VIII, 18). While at Rutgers, he worked with PIRG on a nonpartisan voter registration drive (Tr. VIII, 20-22). Through his PIRG work he developed organizational and communications skills (Tr. VIII, 23) which help him carry out the requirements of his present employment at Barnard (Tr. VIII, 23-24).

f. Wendy Berthold, currently a senior at Rutgers, has worked as a public relations intern at PIRG (Tr. IX, 5). As part of her work, she supervised the work of other Rutgers students who were serving as interns with PIRG (Tr. IX, 11). She found her PIRG work far more valuable to prepare her for her career than classroom experiences, since at PIRG she was able to do substantial work in public relations—including writing and disseminating actual press releases—under the close supervision of the PIRG staff (Tr. IX, 12). She also values PIRG because as an on-campus group it is highly accessible to the students of Rutgers (*Id.*).

g. John O'Brien, another Rutgers senior, has interned with PIRG to study the cleanliness of the drinking water in New Brunswick, New Jersey (Tr. X, 3-4). He hopes to work as an environmentalist and feels that his PIRG experiences have helped shape his career choice and will ultimately help him get a job in his field (Tr. X, 10-11).

h. Kevin Haverty, currently Director of the Energy Division of the Camden County Department of Public Affairs, is

a 1981 Rutgers graduate and a former PIRG intern (Tr. X, 15-16). At PIRG, he researched the feasibility of a state funding program for solar energy for New Jersey citizens of low and middle incomes(Tr. X, 17). As part of his project he did extensive library research and later approached state legislators for support for the proposed funding program (Tr. X, 18-19). He feels that the PIRG staff gave him considerable individual responsibility while guiding him when necessary (Tr. X, 24). He learned about the legislative process through PIRG and decided to pursue a career in public service as a result (Tr. X, 24-25).

37. Those students discussed above who interned with PIRG did so with the approval and supervision of members of the faculty at Rutgers (Tr. VI, 163; Tr. VII, 56-57; Tr. VIII, 59; Tr. IX, 10; Tr. X, 4-5, 22-23). When faculty members authorize PIRG internships they decide what requirements will be imposed and how the student's grade will be computed (Tr. VII, 157-59; Tr. VIII, 36-37).

38. Nine members of the Rutgers faculty, representing a wide variety of academic disciplines, testified for the defendants at trial. No Rutgers faculty members appeared on behalf of the plaintiffs to rebut this testimony. Each of the following faculty members have authorized PIRG internshps and granted some kind of academic credit for work performed by their students at PIRG. Five of these professors identified specific features of PIRG that make PIRG internships superior for their students when compared with alternative internships with other organizations.

a. Peter Sandman, Professor of Humanities and Communications at Rutgers, is the curriculum coordinator in journalism and communications at Cook College, one of the constituent campuses of Rutgers (Tr. V, 95-97). Students in his classes intern with on and off-campus organizations, including PIRG, as an activity adjunct to their classroom work (Tr. V, 103-105). He considers internships valuable in general because they provide students with opportunities to work independently; to simulate the "real world" of employment; to integrate their theoretical knowledge with practical experiences; to feel useful; to test the

employment marketplace and choose a career; and to help make connections for employment after graduation (Tr. V, 122-25).

Although Dr. Sandman believes that all internships can be beneficial for students, he has found PIRG internships superior to other available internships. This is because PIRG is on-campus and readily available for students; PIRG internships focus on topics like tuition and educational issues that are of direct interest to students; the students who work with PIRG feel that they are working for their own organization, run by and for students, rather than for an "outside" organization, the governance of which is beyond their control; PIRG staff members closely supervise the work of PIRG interns and provide more guidance than supervisors in other organizations; and students at PIRG do significant work and have an opportunity to integrate and develop their skills (Tr. V, 125-31).

b. Marshall Stalley is a former Chairman of the Department of Environmental Resources at Cook College (Tr. V, 141-42) who required his students to work in an internship in conjunction with their classroom work in environmental studies (Tr. V, 149-50). Ten to twenty percent of his students worked with PIRG, generally PIRG's Clean Water Action Project (Tr. V, 151). He found PIRG's streamwalking project (*see* Finding No. 33c) particularly educationally valuable, in that students learned about the environment and about the governmental process (Tr. V, 155-56). He believes that PIRG internships are superior to other available internships because PIRG provides "outstanding" supervision of their interns; supervision is provided in a helpful, informal way ("the PIRG staff were kind of informal extensions of the faculty" (Tr. V, 156); PIRG interns feel that they are being active citizens; and students who worked with PIRG were afforded a personal and direct experience with the particular issues on which they worked (*Id.*).

c. John Van Til is Chairman of the Department of Urban Studies and Community Development at the Camden College of Rutgers (Tr. VII, 3). He regularly invited PIRG staff members to his classes to make presentations to his students about PIRG and its activities (Tr. VII, 8) and has supervised internships by his

students with PIRG (Tr. VII, 28-29). He testified that when PIRG supporters lost the most recent referendum at the Camden College of Rutgers, the college lost an important educational resource (Tr. VII, 35). He feels that PIRG provides a "structured educational opportunity" for Rutgers students (Tr. VII, 36) and that PIRG supervisors were committed to an educational mission (*Id.*). He knew that when his students were placed with PIRG they would receive a "quality educational experience" and questioned whether students could get such an experience from other organizations (Tr. VII, 37).

d. Michael Rockland is Chairman of the American Studies Department at the New Brunswick campus of Rutgers (Tr. VII, 155). He has approved and supervised independent study work for students who intern with PIRG in conjunction with their more traditional classroom work (Tr. VII, 158-65).

e. Michael Delli Carpini is an Assistant Professor of Political Science at Rutgers (Tr. VII, 166) who sponsors and gives academic credit for PIRG interns (Tr. VII, 167-68). He values internships as an opportunity for students to apply their academic experiences to practical situations (Tr. VII, 167). He feels that through PIRG students develop organizational skills, and learn the meaning of citizenship and their responsibilities in the political system (Tr. VII, 173).

f. Thomas Hartmann is a Professor of Journalism and Mass Media at the New Brunswick campus who is a strong advocate of experiential education, *i.e.*, learning through experience (Tr. VIII, 3, 11). He has supervised over a hundred Rutgers students in PIRG internships (Tr. VIII, 11). He feels that PIRG internships are superior to other available internships because of the high level of supervision at PIRG; students at PIRG are part of an organization with available leadership positions and opportunities; and PIRG is a well organized and controlled organization (Tr. VIII, 10-14). To the extent that PIRG takes positions on political issues, Dr. Hartmann views advocacy work on such issues to be in itself educationally valuable because of the opportunities it provides for students to lobby and monitor legislation (Tr. VIII, 16-17).

g. David Rosen was a Professor of Human Ecology at Rutgers for nine years, ending in 1983 (Tr. VIII, 28). He supervised PIRG internships and involved PIRG staff members in the teaching of his classes (Tr. VIII, 29-34). He found PIRG particularly helpful for his students because its staff suggested a range of specific projects for students who knew that they were interested in a general subject area (Tr. VIII, 41). Dr. Rosen testified that the educational value of PIRG is not diminished by the fact that students working with PIRG sometimes take positions on particular issues, since to advocate a point of view, students must assemble data and focus their arguments in order to prevail (*Id.*).

h. Jay Sigler is a Professor of Political Science and Director of the Graduate Program in Public Policy at the Camden campus of Rutgers (Tr. X, 30) who has supervised students at PIRG as an activity adjunct to their classroom work (Tr. X, 34). He testified that internships are "eye opening" activities (Tr. X, 37) and that PIRG internships are not noticeably different than internships with other organizations (Tr. X, 38). He served in 1980 at PIRG's request as a neutral moderator at a conference about liquified natural gas organized by PIRG with participants representing diverse points of view (Tr. X, 45-47).

i. Michael Lang is Associate Professor of Urban Studies and Director of the Forum for Policy Research and Public Service at Rutgers (Tr. X, 47-49). He has approved and sponsored students' work with PIRG as an activity adjunct to their classroom work (Tr. X, 51). He believes that internships in general are educationally valuable (Tr. X, 52-56). He believes that PIRG internships are superior to other types of available internships because PIRG is a known entity; because unlike other entities PIRG supervisors uniformly do a good job supervising his students; and because the PIRG coordinators were accessible to him and to his students (Tr. X, 56).

39. Some Rutgers faculty and students, including those who enthusiastically embrace PIRG as providing valuable educational opportunities for Rutgers students, acknowledged that PIRG takes positions on issues of social importance and works to advance those positions (Tr. V, 158-59); Tr. VI, 111; Tr. VII, 181-82; Tr.

X, 62-63). As noted above, however, several professors testified that to the extent there exists advocacy in some of PIRG's projects, that fact enhances rather than detracts from the educational opportunities available through PIRG (Tr. VII, 178-80; Tr. VIII, 16-17, 41-42; *see also* Tr. VI, 56 (Dr. Bloustein) and Findings of Fact Nos. 14, 42, 46).

F. The Opinions of Expert Witnesses About PIRG

40. Plaintiffs and defendants produced expert witnesses to testify about PIRG at Rutgers and similar PIRGs at universities around the nation. Unlike the students and faculty discussed above, these experts (with the exception of Dr. Bloustein) generally did not have first hand knowledge of PIRG at Rutgers. Their testimony was based in part on their experiences with PIRGs at other universities and in part on a review of documents supplied them by counsel. As discussed below, there existed somewhat conflicting views among these individuals as to the nature of PIRG and PIRG's contribution to the academic community.

41. Plaintiffs produced three experts to testify in support of their position.

a. Herbert London is Dean of the Gallatin Division of New York University and an expert in political science and education (Tr. III, 25-27). He thinks that although internships in general can be educationally valuable (Tr. III, 30, 109-10), PIRG internships lack educational value because students at PIRG are working on projects designed by others toward preordained conclusions (Tr. III, 42-45, 55-56). He feels that PIRG operates as a political action group and has only a negligible educational value (Tr. III, 66-67). He testified that formal education is the crucial function of a university and that student organizations are merely peripheral to a university's educational missions (Tr. III, 111-12, 123).[8]

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[8] Defendant's experts emphatically rejected Dr. London's view that extracurricular activities are "peripheral" to the educational mission of a university. They testified that Dr. London's view is out of step with the consensus of opinion among university educators (Tr. VI, 37-44, 71-74; Tr. VII, 122-23; *see also supra* footnote 5).

b. Stanley Rothman is a Professor of Government at Smith College and an expert in political science (Tr. IV, 4-5). He believes that PIRG consistently represents and adheres to a liberal ideology and view of American society as covertly oppressive (Tr. IV, 18-19) and that PIRG takes consistently predictable positions on issues about which there exists public controversy (Tr. IV, 38-42). He believes that people join PIRG because they have certain ideological views that are reinforced by membership in PIRG (Tr. IV, 87) and that universities should be places where students are somewhat removed from ideologies and as fair and dispassionate as possible (Tr. IV, 53).

c. Ellis Katz is an Associate Professor of Political Science at Temple University and an expert in political science (Tr. V, 4-5). He testified that PIRG's essential purpose is to pursue change in the political process (Tr. V, 48) and that all of PIRG's activities, including its research and publications, are merely incidental to that purpose (Tr. X, 123-27). He acknowledged on cross-examination that he could not quantify PIRG's political and non-political activities (Tr. V, 48) and that many of PIRG's activities, including its consumer guides, were non-ideological (Tr. V, 53-56).

42. Defendants produced four experts to testify in support of their position.

a. Edward Bloustein, the President of Rutgers, is an expert in college level education and university administration (Tr. VI, 14-16). As noted above, Dr. Bloustein feels that the neutral funding mechanism itself is educational, because it allows students at large to choose democratically the programs they wish to support and forced students to publicly campaign and promote an organization in an effort to gain the support of their peers (Tr. VI, 45; Finding #11-12).

Dr. Bloustein testified that in PIRG internships students learn through experience, applying the theory of the classroom in practical situations (Tr. VI, 56). To the extent that PIRG participants take and advocate political positions, he feels they benefit educationally by *learning to advocate*

and thoroughly learning their adversaries' positions in order to rebut them (Tr. VI, 57, 62, 65). He drew an analogy to clinical experiences in law schools, as well as in social work and the arts, where students learn through their experiences (Tr. VI, 65-66). He noted that students' individualized PIRG experiences serve as "apprenticeship[s]" for careers and cited examples of Rutgers students who had participated in PIRG who are now professionals in government (Tr. VI, 58).

Finally, Dr. Bloustein noted that PIRG is one of several organizations at Rutgers that engages in advocacy; others include the Rutgers University Legislative Action Committee, a lobbying group funded through the mandatory student fee, and the Eagleton Institute, a Rutgers research center which advocates political positions (Tr. VI, 70-71). He believes that advocacy has an important role to play in the university community, because "[w]hat is essential to freedom of expression and to democracy is to allow the widest possible range of views advocated by those people who believe them" (Tr. VI, 75). He believes that his role as President of Rutgers is to cultivate a "marketplace of ideas" so that the best ideas can prevail (*Id.*).

b. Donald Zander is Associate Vice President for Student Affairs at the University of Minnesota (Tr. VI, 102) and an expert in university administration and education (Tr. VI, 162-70). He is very familiar with Minnesota PIRG ("MPIRG") an organization that was founded in the early 1970s and which is substantially similar to New Jersey PIRG (Exhibit 433; Tr. VI, 179-84). He feels that MPIRG is an "extremely educational" organization, in that it gives students an opportunity to investigate, research, write and advocate their positions before governmental agencies (Tr. VI, 183, 191-92). He similarly believes that New Jersey PIRG has great educational value and that to the extent PIRG engages in advocacy, the students who participate in those activities have valuable educational experiences (Tr. VI, 190-91).

c. Robert Wood was President of the University of

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Massachusetts from 1970-1978 (Tr. VII, 82) and is an expert in university administration, education and political science (Tr. VII, 88). In 1972, the University of Massachusetts administration approved a proposal brought to them by students for a PIRG ("MASSPIRG") at that institution, deciding that a PIRG would provide opportunities for internships; would provide students with an opportunity to work responsibly within the system to further their beliefs; and would provide students with leadership opportunities within their own organization (Tr. VII, 92-93).[9] His experience with MASSPIRG during its first six years at the University of Massachusetts confirmed for him that MASSPIRG significantly enhanced the educational opportunities available for students at that institution (Tr. VII, 105-08). MASSPIRG and New Jersey PIRG are substantially similar organizations (Tr. VII, 111). Dr. Wood believes that substantial educational benefits derive from the presence of PIRG at Rutgers (Tr. VII, 112).

d. Joseph Murphy is the Chancellor of the City University of New York (Tr. X, 83) and an expert in education, university administration and political science (Tr. X, 81). In 1973, while he was President of Queens College, a group of students asked him to support the establishment of a fee to support a New York Public Interest Research Group ("NYPIRG") "to do research on issues of economic, social, political, nature with a view to enhancing their educational horizons" (Tr. X, 86). Their proposal passed with his support (Tr. X, 87-89). He supported NYPIRG because the students wanted to work responsibly for social change; PIRG teaches students to function as citizens; and PIRG allows students to develop practical research and writing

[9] The court notes that the reasons enunciated for the approval of PIRG at the University of Massachusetts are similar to the reasons given by Rutgers in accepting the students' proposal for a PIRG at Rutgers. *See supra* Finding No. 42a; *see also infra* Finding No. 42d (essentially similar reasons given for the approval of a PIRG at Queens College).

skills building on their more traditional academic work (Tr. X, 89-91). He feels that NYPIRG—now funded at seven of the colleges within the City University of New York—substantially contributes to the education of students at that university (Tr. X, 96). NYPIRG and New Jersey PIRG are substantially similar (Tr. X, 96-98). Dr. Murphy feels that the type of work done by PIRG is inherently educational (Tr. X, 97-98).[10]

43. The PIRGs at the institutions represented by defendants' experts, like New Jersey PIRG, are funded by students through fees paid with their registration, with students retaining the option of not supporting PIRG, generally by paying the fee and later getting a refund (Tr. VI, 175-76 (University of Minnesota); Tr. VII, 101-02 (University of Massachusetts); Tr. X, 88 (City University of New York)).

Conclusions

The following Findings are based on the court's overall review of the testimony at trial and the exhibits submitted for its consideration.

44. The administration at Rutgers has made a carefully reasoned decision that PIRG is a valuable educational adjunct to the more traditional classroom activities at the University. This decision as to the educational value of PIRG was originally made in 1972 and has been formally reaffirmed by the University on at least three occasions, upon review of PIRG's "concept plans." In addition to finding that PIRG itself is educationally valuable, the

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[10] When asked whether he could quantify "educational" and "political" components of New Jersey PIRG, Dr. Murphy responded:

> Well, I can't imagine that's an easy thing to do. I would say that long after the particular political exercise will have been forgotten, the educational lesson should be retained. Namely, people understand that people who are educated, at least understand that they are not thrown hither and thither in a raging stream but they are in control of their lives and that they have learned to deal with the concepts that describe the conditions of life which they live with. And that's part of what's involved in being educated.

(Tr. X, 98).

University found that the neutral funding mechanism itself, with its campaigns and referenda, is inherently educational. The University does not advance its own viewpoints through the neutral funding mechanism, but allows students to choose democratically the organizations they wish to support, while allowing dissenters to obtain refunds of their fees.

45. PIRG staff and students have engaged in a wide variety of public service and educational projects, and have researched, written and published informational guides and pamphlets in many fields of particular concern to students and to the public at large. They have sponsored debates and public fora on matters of public interest. In addition, PIRG, through its board of directors, has taken positions on issues of social importance—such as the development and enforcement of environmental protection laws—and has worked to advance its positions, generally through the dissemination of information and through advocacy in the university community and the general public, and before appropriate governmental bodies. PIRG has thus engaged in projects that can be objectively characterized as both "educational" and "political." Because of the fact that some activities ostensibly political are also inherently educational (*see* Findings Nos. 39 and 42) it is impossible to neatly quantify PIRG's activities into these simplistic categories.

46. To the extent that PIRG engages in advocacy, the experience of being an advocate and working in the political and governmental process is in itself educational. The experience of advocacy teaches students to articulate effectively their positions on issues that concern them, and to become effective participants in the political process. In short, the court finds that the evidence supports defendants' position that students' experiences with PIRG help them learn the value of citizenship in a democracy, and help them develop the tools needed to participate effectively in that democracy.

47. To the extent that PIRG engages in advocacy, PIRG is one of many organizations at Rutgers that takes positions on issues of social importance and works to advance its positions. It is thus one of many voices in the University's marketplace of ideas. Stu-

dent funding of most of the other "voices" in the university community is mandatory and non-refundable, as part of the general student activities fee.

48. Students at Rutgers are free to support or oppose PIRG and the positions it takes, and are free to oppose PIRG at the periodic referenda held at the constituent campuses of Rutgers. Students who oppose PIRG's views are absolutely free to work together to express their own views. They are also free to invoke Rutgers' neutral, non-ideological special funding policy for the funding of an alternative organization, or to seek funding for their organization through the mandatory student activities fee.

49. PIRG is a student organization. Its Board of Directors, composed entirely of students, select PIRG's activities and the positions PIRG takes on issues of public importance. Although some issues (especially environmental protection) have been of ongoing interest to PIRG, the focus of the organization's energies have varied over the years, as evidenced in part by the diversity of publications produced by PIRG over the years. The implementation of PIRG's activities and policies is largely entrusted to PIRG's professional staff and the student interns and volunteers who work under their direction.

50. The unrebutted testimony of students who have participated in PIRG was that PIRG significantly enhances the educational opportunities available at Rutgers. It provides leadership positions, opportunities and experiences which allow students to develop organizational, group management and communications skills. Through its wide-ranging internship program, PIRG provides exceptional opportunities for students to learn through actual field experiences, to apply the information they learn in class to practical situations, and to meet and work under the direction of individuals outside the immediate university community, sometimes helping the students choose careers or get jobs in their fields upon graduation.

51. The unrebutted testimony of members of the Rutger faculty was also that PIRG significantly enhances the educational opportunities available at Rutgers. The professors who testified emphatically endorsed internships as valuable educational adjuncts

to classroom experiences. All have given credit for students' work at PIRG and most felt that PIRG internships are superior to other available internships, primarily because of PIRG's excellent supervision of student interns, because PIRG is on-campus and accessible to both faculty and students, and because PIRG is an organization that works on issues of particular interest to students.

52. Eminent university administrators with personal knowledge of PIRGs at other universities have corroborated the defendants' position that PIRG is an educational organization and that the presence of PIRG enhances educational opportunities at Rutgers.

53. To the extent that plaintiffs' experts disagree with defendants' experts about the nature of PIRG and its contributions to the university community, the court finds that there exists on these issues some difference of opinion in the academic community. The unrebutted testimony of Rutgers students and faculty, and the very credible and persuasive testimony of experts from other major academic institutions, support the University's judgment.[11]

54. The court finds that PIRG has a very substantial educational component, and that its presence at Rutgers significantly

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[11] In the case at bar, the evidence overwhelmingly supported defendants' position that PIRG has substantial educational value. Even if this were a closer case, however, this court would not be free to simply substitute its judgment or the judgments of plaintiffs' experts for the presumptively valid judgment of the Rutgers administration, except under the narrow and inapplicable circumstances enunciated in *Galda, supra*, 686 F.2d at 166. *See Widmar v. Vincent*, 454 U.S. 263, 275-76, 102 S.Ct. 269, 277-78, 70 L.Ed.2d 440 (opinion of the court), 278-79, 102 S.Ct. 278-79(Stevens, J., concurring in the judgment)(1981); *Healy v. James*, 408 U.S. 169, 180 92 S.Ct. 2338, 2345, 33 L.Ed.2d 266 (1972); *Kania v. Fordham*, 702 F.2d 475, 480 n. 9 (4th Cir.1983)(academic judgments should be made by academicians, not by federal judges).

enhances the educational opportunities available for students at that institution.[12]

The following Conclusions of Law, insofar as they may also be considered Findings of Fact, are so found to be true in all respects.

CONCLUSIONS OF LAW

1. Plaintiffs in this action allege that the exaction of the refundable PIRG fee by Rutgers and the payment of that fee to PIRG violates their First Amendment rights. Second Amended Complaint, ¶¶ 32-33.

2. The Rutgers administration has determined that PIRG enhances the educational opportunities available at Rutgers and that PIRG has substantial educational value.

3. "To overcome the presumptive validity of the university's judgment that an organization contributes to the university com-

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[12] The court notes that on June 1, 1984, three months after the conclusion of the trial in this case, plaintiffs moved pursuant to Federal Rule of Civil Procedure 60(a) to reopen the record to admit certain additional evidence. Plaintiffs contend that they have recently discovered that Rutgers has on at least one occasion sent a delinquency notice to a student who failed to pay the PIRG fee. Plaintiffs seek to admit evidence of this incident and to withdraw from their stipulations that they know of no incident wherein Rutgers has discouraged students from requesting refunds of the PIRG fee or to punish those students who refuse to pay the fee. *See* Finding No. 18. Defendants vigorously oppose reopening the record of this case at this late date.

The court will deny plaintiffs' motion. First, Rule 60(a) is a rule designed to correct clerical mistakes and other errors, and to relitigate matters decided at trial. Second, the evidence proffered by the plaintiffs is of dubious relevance, since the delinquency notice in question was simply an administrative "notice of unpaid balance" and did not mention PIRG or the PIRG fee. It therefore does not give rise to the sweeping inferences urged by the plaintiffs that Rutgers specifically attempts to collect unpaid PIRG fees. Third, even if true, evidence that Rutgers once sent a delinquency notice to a student on her tuition bill does not contradict plaintiffs' stipulations that no plaintiff is aware of any incident of Rutgers discouraging students from requesting a refund of their PIRG fee once it is paid, or of Rutgers punishing students for requesting or receiving a refund of their PIRG fee. Plaintiffs' position is therefore without merit.

In any event, the court has concluded that the plaintiffs have not rebutted defendants' presumptively valid judgment that PIRG has substantial educational value. This being so, Rutgers could have made the PIRG fee mandatory rather than refundable, and could also legitimately pursue and collect the PIRG fee from enrolled students who have failed to pay the fee. Thus the result in this case would not be altered in any respect by the evidence plaintiffs seek to admit.

munity, and to make out a prima facie case that exaction of the fee conflicts with the mandates of the First Amendment, persons objecting to the fee must establish that the challenged group functions essentially as a political action group with only an incidental education component." *Galda v. Bloustein*, 686 F.2d 159, 166 (3rd Cir. 1982).

4. Based on the evidence adduced at trial, the court has found that PIRG at Rutgers has a very substantial educational component, and that its presence at Rutgers significantly enhances the educational opportunities available for students at that university.

5. The court therefore finds that the plaintiffs have failed to overcome the presumptive validity of the University's judgment and have thus failed to make out a prima facie case that their constitutional rights have been violated.

6. Judgment of no cause of action will be entered for the defendants and against the plaintiffs.

An appropriate order will be entered.

/s/ Stanley S. Brotman
STANLEY S. BROTMAN, U.S.D.J.

Dated: June 20, 1984

FUNDING SPECIAL STUDENT PROGRAMS
Policy Statement

The following is a statement of University policy regarding the funding of student sponsored programs and organizations which are not legally eligible to receive funds from student activity accounts:

(1) Each organization is required to present its program and plans for concept review to the University Senate for recommendation to the President.

(2) If approved, the organization shall seek college referenda on the issue of student funding support for their program. At least fifty percent of the student body of each division of the University shall be required to participate in such referenda and a majority of those voting must approve the project in order for implementation within that division. As an alternate, an affirmative vote of twenty-five per cent of the student body plus one shall be adequate to meet this test.

(3) The organization shall then be listed on the University term bill with payment of the indicated fee mandatory. A post-card asking for a refund shall be included along with the term bill which shall be sent by the individual student to the organization and which shall send the refund directly to the student.

(4) Each organization so funded shall be expected to defray the University cost of administration of the fee collection and refund.

(5) Each organization shall be required every three years to meet the tests defined under items #1 and #2 above in order to continue to receive funds under this policy and procedure.

Supreme Court, U.S.
FILED
FEB 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-1036 and 85-1037

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, *et al.*,
Petitioners,

v.

JOSEPH P. GALDA, *et al.*,
Respondents.

NEW JERSEY PUBLIC INTEREST RESEARCH GROUP INC.,
Petitioner,

v.

JOSEPH P. GALDA, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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February 1986

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QUESTIONS PRESENTED FOR REVIEW

1. May a state university constitutionally compel its students to pay a mandatory fee, each semester, to an independent, outside organization, which generates and actively promotes political and ideological positions, even though the fee may eventually be refunded?

2. If it is determined that a state university may not constitutionally compel its students to pay a mandatory fee, each semester, to an independent, outside organization, which generates and actively promotes political and ideological positions, did the appellate court err in enjoining the continued collection of the mandatory fee?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents herein respectfully request that this Court deny the petitions for *writs of certiorari*, seeking review of the Third Circuit's opinion in this case. That opinion is reported at 772 F.2d 1060.

STATEMENT OF THE CASE

In 1979, three students at the Rutgers Camden College of Arts and Sciences filed suit against the University

contending that they could not constitutionally be required to support an independent, political and ideological group as a precondition of their enrollment at the state university.[1] Specifically, they objected to being forced to pay a special fee, which was then transferred to the New Jersey Public Interest Research Group (hereinafter referred to as "PIRG"). Although during the course of the litigation the lawsuit has been expanded, and now includes additional students as well as the entire Rutgers' system, their challenge remains the same.

Since 1972, Rutgers, the State University of New Jersey (hereinafter referred to as "Rutgers"), has compelled its students to pay a separate PIRG fee, each semester, which has risen from $1.50 to $3.50 per semester. 80a.[2] Between 1972 and 1984, the total amount collected by Rutgers and transferred to PIRG was over $800,000. *Id.* Payment of the PIRG fee is mandatory, but may be eventually refunded upon the written request of an individual student.

PIRG is a non-partisan, non-profit New Jersey corporation completely independent of Rutgers. 77a. It was and remains ineligible for funding from Rutgers' general student activity fee because of its independence. *Id.* PIRG is a state-wide organization, and its membership is composed of students at Rutgers, students from other colleges and universities, as well as other interested citizens.

PIRG is an organization created to research and lobby for social change. 77a.[3] New Jersey PIRG "spon-

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1. The parties stipulated, for the purposes of this action only, that action taken by Rutgers is state action. 76a.

2. Citations to the Joint Appendix to petitioners' petitions will be cited in the form "_____a."

3. PIRGs were initially welcomed by university adminstrators among other reasons because they were a vehicle for students to develop and further their political and social beliefs in a socially acceptable manner. PIRGs developed nationally shortly after the height of student unrest stemming from American involvement in

sors debates, lectures and public fora on matters of public interest and concern. The subjects of these functions have included such issues as education and tuition policy, decision making in the energy field, and the Equal Rights Amendment." 86a. It is extremely involved in issues affecting the environment and consumer protection. 86a-87a. In addition, "other major areas of PIRG's work include energy conservation, tuition policy and financial aid, tenant's rights, and women's rights." 87a.

The district court found that several of the defendants' witnesses at trial "acknowledged that PIRG takes positions on issues of social importance and works to advance those positions." 94a. The district court further found that:

> PIRG, through its board of directors, has taken positions on issues of social importance—such as the development and enforcement of environmental protection laws—and has worked to advance its positions, generally through the dissemination of information and through advocacy in the university community and the general public, and before appropriate governmental bodies . . . . 100a.

With respect to the unrebutted testimony of the students' expert witnesses regarding PIRG's primary function and purpose, the district court made the following findings:

> Stanley Rothman is a Professor of Government at Smith College and an expert in political science. He believes that PIRG consistently represents and adheres to a liberal ideology and view of American society as covertly oppressive and that PIRG takes consistently predictable positions on issues about which there exists public controversy. He believes

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the Vietnam War. The proposed structure of PIRGs was suggested by Ralph Nader and Donald Ross in their book 'Action For a Change,' published in 1972. 78a.

that people join PIRG because they have certain ideological views that are reinforced by membership in PIRG and that universities should be places where students are somewhat removed from ideologies and as fair and dispassionate as possible.

Ellis Katz is an Associate Professor of Political Science at Temple University and an expert in political science. He testified that PIRG's essential purpose is to pursue change in the political process and that all of PIRG's activities, including its research and publications, are merely incidental to that purpose. He acknowledged on cross-examination that he could not quantify PIRG's political and non-political activities and that many of PIRG's activities, including its consumer guides, were non-ideological. 96a.

At the conclusion of the ten-day bench trial the district court found in favor of the defendants, holding that the students had "failed to make out a *prima facie* case that their constitutional rights [had] been violated." 104a. The district court's decision was premised upon its view that students at Rutgers who participated in PIRG learned from their experience. It accepted the University's judgment for this position and adopted it as its own. 103a-104a. Educational benefit was found to be dispositive. Thus, PIRG's political and ideological activities were deemed acceptable, because they provided students with the opportunity to learn. The district court made no findings regarding PIRG's primary purpose or essential function.[4] Having found that PIRG's activities

4. With respect to the testimony of the students' expert witnesses, the district court determined that "[T]o the extent that plaintiffs' experts disagree with defendants' experts about the nature of PIRG and its contributions to the university community, the court finds that there exists on these issues some difference of opinion in the academic community." 102a.

enhanced the educational opportunities at Rutgers, 109a, it upheld the mandatory exaction of the PIRG fee.

The students appealed the district court's ruling to the United States Court of Appeals for the Third Circuit, which, by a 2-to-1 decision with Judge Adams dissenting, reversed the lower court's ruling and enjoined the continued exaction of the PIRG fee.[5] 1a-18a.

The circuit court framed the issue before it as "whether a state university may compel students to pay a specified sum, albeit refundable, to an independent outside organization that espouses and actively promotes a political and ideological philosophy which they oppose and do not wish to support." 11a.

The appellate court then reviewed the district court's findings with respect to PIRG's structure and activities, as well as the educational evaulations of those activities offered by the defendants and adopted by the district court. 12a. It determined that PIRG functions primarily as a political/ideological group, stating:

> PIRG's efforts are primarily devoted to changing conditions outside the University. For example, its interest in environmental and energy concerns focuses on state-wide or national issues. Similar in scope is its commitment to enactment of an equal rights amendment, reform of tenants rights, and a nuclear weapons freeze. While such matters may affect the general public, those causes are not particularly germane to students of the University *qua* students. 12a.
>
> . . . .
>
> . . . The district court in reciting PIRG's history stated, 'Under the students' proposal, PIRG was to be a non-partisan, non-profit corporation which

5. Respondents dispute PIRG's representation that the court of appeals implicity affirmed the district court's denial of class certification. Pp 7. To the contrary, the court of appeals never ruled upon this issue.

> would research and lobby for social change.' [citation omitted]. Those functions have continued to be PIRG's *raison d'etre* as a review of its programs and activities confirms. 13a.

Although the district court had acknowledged PIRG's political and ideological activities, it ruled in favor of the defendants because it found that participation in these activities by students at Rutgers was educational. Thus, the students' first amendment rights were not violated by the compelled exaction of the PIRG fee, because all of PIRG's activities, including the political and ideological ones, were deemed by the district court to be educational. The circuit court, however, refused to allow educational benefit to immunize what it found PIRG's essential function and purpose to be—the pursuit of defined social and ideological change. It stated:

> Although the training PIRG members may receive is considerable, there can be no doubt that it is secondary to PIRG's stated objectives of a frankly ideological bent. To that extent the educational benefits are only 'incidental'—arising from or accompanying the principal objectives—and subordinate to the group's function of promoting its political and ideological aims. 13a.
>
> . . . .
>
> We conclude that defendants did not overcome the caution we raised in our first opinion—the educational component cannot obscure the underlying substance of the plaintiff's complaint that they were compelled to finance a political entity whose function is to attain certain fixed ideological objectives. 686 F.2d at 166. 14a.

Having determined that educational benefit could not transform PIRG's primary function and purpose into

constitutionally permissible activity, the circuit court addressed the question of whether Rutgers had demonstrated a sufficiently compelling state interest which would nevertheless permit it to continue to exact the PIRG fee, thus justifying the violation of the students' first amendment rights.

The circuit court again distinguished PIRG, an independent, state-wide organization, from other student groups on Rutgers' campuses. It also noted that the availability of the funding policy to other entities did not cure the underlying constitutional infringement—students would still be forced to contribute to political and ideological entities with which they disagreed or would voluntarily choose not to support. 17a. Finally, it ruled that Rutgers had not demonstrated any compelling state interest that would permit the continued abridgement of the students' first amendment rights. *Id.*

Accordingly, the circuit court held that:

> [T]he district court erred in concluding that plaintiffs had failed to make out a *prima facie* case. They presented credible evidence that PIRG was an outside independent, ideologically-oriented organization whose activities they opposed but were nevertheless compelled to support directly through a mandatory fee. Those facts were not disputed, and by presenting that evidence plaintiffs established a *prima facie* case.
>
> The University relied on the deference to be given its judgment as to PIRG's educational value. But as has been discussed, that judgment was not supported by evidence of an educational component other than that incidental to, and inherent in, the ideological activities. Moreover, the district court did not make any findings to demonstrate a compelling state interest that would justify utilization of PIRG as a vehicle for the incidental educational benefits in

preference to a campus, or another outside organization, which did not require the compelled support of plaintiffs. 18a.

Judge Adams, in a lengthy opinion, dissented and would have affirmed the district court's ruling. 19a-40a. Defendants' Petition for Rehearing was denied. 69a-70a. Defendants now petition this Court for *writs* of *certiorari.*

REASONS WHY THE WRIT SHOULD BE DENIED

THE DECISION OF THE COURT BELOW RESPECTS AND PRESERVES THE FUNDAMENTAL FIRST AMENDMENT FREEDOM OF ALL CITIZENS TO VOLUNTARILY SUPPORT, OPPOSE OR REMAIN UNINVOLVED WITH RESPECT TO ANOTHER'S IDEOLOGY.

The respondents herein challenge the authority of Rutgers to compel its students to pay a mandatory, distinct fee, each semester, which is then transmitted to PIRG. Essentially, they contend that Rutgers, an instrumentality of the state, cannot constitutionally compel them to support an independent, political and ideological organization as a precondition of their enrollment at the state university.

I. This case involves only the state required contribution to an independent, political and ideological organization.

With respect to the exaction and subsequent transmission of the PIRG fee by Rutgers, the precise issue before this Court is "whether a state university may compel students to pay a specified sum, albeit refundable, to an independent outside organization that espouses and actively promotes a political and ideological philosophy which they oppose and do not wish to support." 11a.

The district court found that students at Rutgers were required to pay the PIRG fee; that PIRG was a private corporation independent of the University; and that PIRG generated political and ideological positions and worked actively to promote them. Although the district court ultimately ruled that the University's judgment as to the educational value of participation in PIRG validated, in constitutional terms, these activities, its aforesaid findings remain applicable. Thus, the dispute herein is much narrower than that proposed by the petitioners.

In this regard, the circuit court explicitly identified the issues which were not before it, stating:

> This case does not address the problem presented by a state university's allocation of a mandatory nonrefundable student activity fee. We are not concerned here with the question whether an organization with PIRG's philosophic outlook may be funded through the general activities fund as are other campus organizations representing diverse views.
>
> In short, we do not enter the controversy on whether a given campus organization may participate in the general activities fee despite the objections of some who are required to contribute to that fund. *See, e.g., Kania v. Fordham,* 702 F.2d 475 (4th Cir. 1983); *Maryland Public Interest Research Group v. Elkins,* 565 F.2d 864 (4th Cir. 1977). *See also* Note, *"Fee Speech:" First Amendment Limitations on Student Fee Expenditures,* 20 Cal. W.L. Rev. 279 (1984).
>
> And, although we are reluctant to belabor the obvious, it apparenly must be made absolutely clear that in no way does this case present the issue of whether PIRG or any other organization may be restricted in the expression of its views on campus or

> elsewhere. Nor does this case in any way question PIRG's right to finance its operations by voluntary contributions from those who agree with its objectives. 10a.

Accordingly, despite the petitioners' assertions to the contrary, the analysis of this controversy must remain focused upon the element of involuntary support for a particular ideology inherent in the PIRG fee.

II. The decision below neither restricts Rutgers' academic freedom nor prohibits PIRG from generating and advancing the political and ideological positions of its choice. PIRG remains free to generate its support through voluntary means.

Petitioners contend that the court's decision in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985); 1a-40a (hereinafter referred to as *"Galda II"*), will wreak havoc upon state universities across the nation, They suggest that the academic freedom enjoyed by Rutgers and other state universities will be severely limited. They submit that courts and universities will have to be "content" sensitive in carrying out their respective responsibilities. Finally, they assert that the constitutional rights of the majority will be abridged. Rp 10-17; Pp 10-16.[6] However, an examination of the actual holding of *Galda II* reveals that petitioners' concerns are unfounded.

First, should Rutgers so desire, it will be and always has been free to encourage its students to become involved with PIRG and participate in PIRG's activities. Second, PIRG will be free to generate positions on political and ideological issues and work actively to promote them. Third, PIRG will have unlimited access to the entire Rutgers' community; it may remain on the various

6. Citations to Rutgers' petition will be cited in the form "Rp_____."; citations to PIRG's petition will be cited in the form "Pp_____."

campuses; and it will have every opportunity to seek support through truly voluntary means. Finally, any student at Rutgers desiring to participate in PIRG's activities will be able to do so, and will be and always has been free to voluntarily support PIRG, financially or otherwise, at whatever level he or she desires. The freedoms set forth above have never been the subject of the students' constitutional challenge.

GALDA II only prohibits the requirement that every student at Rutgers support PIRG in exchange for an education at the state university. Consequently, Rutgers remains unaffected, except for the fact that it will no longer be able to compel all of its students to support an independent, political and ideological entity. Judge Adams, writing for the majority in *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1981); 45a-65a (hereinafter referred to as "*Galda I*"), recognized this limitation on a state university's authority, stating:

> To be sure, one by-product of PIRG is the education of its participants. But that end might also have been secured if the student-participants had worked for a political action group totally unconnected with [Rutgers], and yet it could not be seriously contended that student fees could be funneled to such a group. 686 F.2d at 166; 58a.

Since Rutgers is free in all other respects to continue its involvement with PIRG, Rutgers has only lost that which it never constitutionally possessed.

Moreover, the fact that *The Daily Targum*, the student newspaper at Rutgers, is now funded in the same manner as PIRG does not compel a contrary conclusion. PIRG and *The Daily Targum* are inherently different. PIRG is an entity independent of Rutgers. It is no different than the Americans for Democratic Action or the Moral Majority. Conversely, *The Daily Targum* is the

campus newspaper. Because Rutgers now chooses to fund its student newspaper differently in no way legitimizes the mandatory contributions to PIRG.[7]

Although not raised by the petitioners, the real effect of *Galda II* is more pronounced upon PIRG. The PIRG fee process at Rutgers required an up-front contribution of $3.50 from every student, each semester. Thereafter, a student could obtain a refund provided that he or she identified themselves and complied with a set of precise directives. Logic dictates that three classes of individuals would emerge. First, those students who were in agreement with the goals and objectives of PIRG and wished to contribute to their furtherance. Second, those students who actively opposed the positions of PIRG and who were willing to make known their dissent by complying with the refund procedure. Finally, and in all probability the largest of the three, those students who would not have voluntarily contributed to PIRG, but who were unwilling to make the substantial efforts necessary, on eight occasions, to secure a refund. In *Galda I*, Judge Adams acknowledged the involuntary nature of a large portion of this type of support when he stated:

> The dissenters object to the *entire* fee; and under the University's refund system, the entire fee would have been returned to the dissenter upon request. We have been presented with no convincing

---

7. Rutgers did not elect to fund *The Daily Targum*, one of the nation's oldest continuously operating student newspapers, through the Special Student Funding Policy until 1980. Prior to that time, students at Rutgers were nevertheless required to subsidize their campus newspaper. However, mandatory student support of a campus newspaper has been upheld because of the important state interest which a student newspaper furthers. *See, e.g., Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983). In the instant matter, PIRG does not enjoy similar status. Thus, while Rutgers may be free to compel student funding for the campus newspaper, respondents submit that similar funding for an independent, political and ideological action group is proscribed by the first amendment.

> reason—besides the obvious motive to procure additional funding from those students who do not wish to join PIRG but who are indifferent enough to forego seeking a refund—why PIRG could not obtain its financial support through purely voluntary contributions. 686 F.2d at 169 n.17; 64a. (emphasis in original).

Thus, PIRG will lose the advantage of generating its support through the university's mandatory billing process. Moreover, it will no longer receive the benefit of contributions secured from those students unwilling to avail themselves of the refund procedure. However, while these sums may be substantial, respondents contend that their loss will not justify or permit the perpetuation of unconstitutional exactions from all students at Rutgers.

III. The decision below is consistent with this Court's rulings in Widmar v. Vincent, 454 U.S. 263 (1981), and Healy v. James, 408 U.S. 169 (1972). Voluntary student participation in and support of PIRG remains unchanged.

Petitioners attempt to raise the spectre of irreconcilable conflicts between the decision in *Galda II* and this Court's opinions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Healy v. James*, 408 U.S. 169 (1972). However, *Galda II* is not an "access" case. Moreover, when the actual conduct at issue and the precise holding of *Galda II* are examined, it becomes apparent that all three cases are consistent.

In *Widmar v. Vincent*, this Court held that where a university generally made its facilities available to all student groups it could not exclude certain student organizations based upon their religious content. 454 U.S. at 277. Similarly, in *Healy v. James*, this Court ruled that a university could not refuse recognition to a student organization soley on the basis of the group's political philosophy. 408 U.S. at 187, 188. Neither case involved

compelled, separate financial contributions to the organizations at issue by the entire student body, nor did either case contemplate that all students would be required to worship with Cornerstone or become members of the Students for a Democratic Society.

Rutgers has decided to encorage its students to become involved with and participate in PIRG. Thus, it has allowed PIRG access to the Rutgers' campuses. Provided that Rutgers does not preclude this access to other independent, political and ideological groups because of their ideological content, it is free to maintain this situation. *Widmar v. Vincent*, 454 U.S. 263; *Healy v. James*, 408 U.S. 169. However, respondents submit that Rutgers is not free to force any student to support these organizations.

Galda II proscribes compelled contributions to independent, ideological groups as a precondition of enrollment at a state university. It does not impact upon PIRG's or any other independent group's access to the Rutgers' community, nor does it have any effect upon the content of a particular entity's political and ideological positions. Thus, Rutgers remains totally free "to determine for itself on academic ground who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Widmar v. Vincent*, 454 U.S. at 276, *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result). Moreover, Rutgers' academic freedom—in terms of the content to which its students will be exposed—is respected and preserved by the decision in *Galda II*.

Petitioners confuse the academic freedom and first amendment principles set forth in *Widmar* and *Healy* with the constitutional limitations on a state university's authority to compel ideological contributions imposed by the circuit court in *Galda II*. Essentially, they contend that as long as Rutgers does not attempt to advance its

own ideology, it is free to require its students to support any number of independent, ideological organizations under the guise of advancing a public forum.

Neither *Widmar*, 454 U.S. 263, nor *Healy*, 408 U.S. 169, extended the concept of academic freedom this far. Indeed, taken to its logical extent, petitioners' argument suggests the proposition that Rutgers may compel funding for any organization, even a political party, as long as it permits that organization's ideological competitors equal access to the funding process. However, simply because Democrats and Republicans or PIRG's and "Anti-PIRG's" can avail themselves of a particular funding policy does not cure the underlying constitutional infringement. In a mandaory fee situation, students who oppose either or both organizations, or who would prefer not to contribute at all, are all compelled to support a particular ideology against their wishes. Neither *Widmar*, 454 U.S. 263, nor *Healy*, 408 U.S. 169, mandate this result, nor does any claim of academic freedom justify this abridgement of an individual's first amendment rights. Accordingly, *Galda II* is consistent with both *Widmar*, 454 U.S. 263, and *Healy*, 408 U.S. 163.

Similarly, any suggestion that the holding in *Galda II* infringes upon the first amendment rights of those students at Rutgers who support PIRG must be rejected. Any student at Rutgers remains free to voluntarily support PIRG at whatever level he or she chooses. All that has been denied are the "right" to be subjected to a mandatory fee and the convenience of making one's contribution via the university's billing system. Neither of these factors are rights guaranteed to anyone by the constitution, nor does the decision in *Galda II* extend beyond these limitations. Consequently, the first amendment freedoms established in *Widmar*, 454 U.S. 263, and *Healy*, 408 U.S. 169, remain unaffected by the true holding in *Galda II*.

IV. Having determined that the exaction of the PIRG fee by Rutgers was unconstitutional, the injunction ordered by the court below was proper.

Petitioners finally contend that even if the circuit court was correct in its decision on the merits, it was wrong in enjoining the collection of the PIRG fee. Rp 17-19; Pp 16-17. Although this assertion was never raised until PIRG's Petition for Rehearing, apparently Rutgers and PIRG now believe that the circuit court had some affirmative duty to fashion a legal plan for the funding of PIRG.

This implicit suggestion is troubling and should be rejected. The circuit court rendered a decision on the actual case before it. The adequacy of any of the alternatives proposed by the petitioners was not before the court—only the conduct itself was at issue. The court determined that the exaction of the PIRG fee by Rutgers was unconstitutional and enjoined any further collection. This was perfectly appropriate. Respondents are unaware of any theory of law which imposes an affirmative obligation on a court, which has ruled on the merits of a case, to advance what is essentially an advisory opinion as to how a losing party can bring its conduct into conformity with the constitution.

Moreover, petitioners' citation to *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 104 S. Ct. 1883 (1984) is inapposite. *Ellis* involved an examination of the constitutionality of certain union expenditures, paid for by a representation fee, which were alleged to be unrelated to the union's role as the collective bargaining agent. *Id.*[8] The underlying constitutional cause of action —that non-union employees could not be compelled to

8. Mandatory payment of that portion of the representation fee which is applicable to the union's role as a collective bargaining agent is constitutionally permissible, because it furthers the important national interest of labor peace. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

support union activities unrelated to collective bargaining—was never at issue. All parties agreed that non-union employees could not be so compelled.

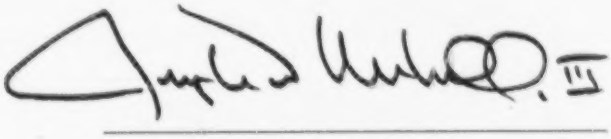
In addition, petitioners' reliance upon *Ellis*, 104 S. Ct. 1883, is also misplaced. The remedies discussed in *Ellis*, *Id.*, as well as in *Abood*, 431 U.S. 209, centered upon the union's legitimate right to a portion of the agency shop fee. Thus, an accommodation had to be reached between the funds a union could constitutionally compel and those it could not. In the instant matter, no such "split-fee" is involved. It follows, then, that if Rutgers cannot constitutionally collect any portion of the PIRG fee, there is no concomitant need or requirement for a reviewing court to establish any of the remedial measures proposed by the petitioners. As such, the entry of an injunction was proper.

Rutgers has been found to have been engaged in unconstitutional conduct with respect to its assessment of the PIRG fee. The circuit court made it clear that truly voluntary support of PIRG was permissible, but that compelled support was not. Should the University continue to desire to assist PIRG in generating financial contributions, the burden is properly upon Rutgers to devise a system which does not offend the first amendment rights of its students. If any new system is instituted, it will have to pass the test of voluntariness. This is nothing more than that required by the constitution.

CONCLUSION

For the reasons set forth above, the petitions for *writs* of *certiorari should be denied.*

Respectfully submitted,



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February 1986

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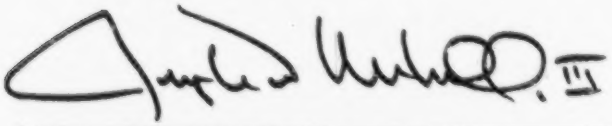

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No. 85-1036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, *et al.*,

Petitioners,

v.

JOSEPH P. GALDA, *et al.*,

Respondents.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTERESTS OF AMICUS CURIAE

Amicus Curiae National Association of State Universities and Land-Grant Collges ("Association") represents the interests of 148 of the nation's principal public universities.[1] These colleges and universities, which generally are supported primarily by state funds, will be directly and adversely affected if the decision of the Third Circuit is

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[1]The members of the Association are identified in the Addendum attached hereto. All parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

allowed to stand. Accordingly, on behalf of its members, the Association urges this Court to grant the petition for certiorari filed by Rutgers, The State University of New Jersey ("Rutgers"), in No. 85-1036, and to set the case for briefing and oral argument.[2]

STATEMENT

The background of this litigation and the evolution of the funding mechanism at issue in this case are adequately set forth in Rutgers' petition, and will not be repeated here. Similarly, because Rutgers' petition presents a comprehensive statement of the reasons why plenary review of the decision below is warranted, *amicus* joins in the arguments made by Rutgers rather than attempting to restate them. *Amicus* believes, however, that it is worthwhile to file this brief to bring to the Court's attention two issues of critical importance to the Association and its members.

First, the decision below disregards basic principles of academic freedom, and needlessly entangles the courts in scrutinizing the fundamentally academic decisions made by university faculties and administrators. *Second,* the Third Circuit's ruling threatens the ability of state-funded colleges and universities to encourage diversity of student groups on campus. The decision below stands as an open invitation to students who disagree with the positions taken by any student organization receiving any sort of support from a university to utilize federal court actions as

[2] *Amicus* recognizes that the New Jersey Public Interest Research Group ("NJPIRG") has also filed a petition for certiorari, No. 85-1037, seeking review of the same judgment at issue here. Because NJPIRG's petition seeks the same result as the petition filed by Rutgers, *amicus* supports NJPIRG's petition as well.

a mechanism for tailoring the university's educational programs and activities to suit their own views and beliefs. That prospect is obviously of grave concern to *amicus* and its members. Thus, because this case has far-reaching implications for every state-supported university in the nation, it warrants plenary review by this Court.

ARGUMENT

A. Prior Decisions of This Court Require a Grant of Certiorari

This Court has long recognized that in order to foster diversity and excellence in our nation's educational institutions, a college or university must be accorded the latitude " 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' " *Widmar v. Vincent,* 454 U.S. 263, 278 (1981), *quoting Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result). Indeed, just two months ago, this Court proclaimed:

> When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee did not actually exercise professional judgment.

Regents of the University of Michigan v. Ewing, 54 U.S.L.W. 4055, 4058 (U.S. No. 84-1273, December 12 1985) (citation and footnote omitted). Whether the judgment concerns grades or the recognition of student organizations, this Court has consistently adhered to "this Nation's dedication to safeguarding academic freedom" because

"the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas . . .' " *Healy v. James,* 408 U.S. 169, 180-81 (1972), *quoting Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967). *See Sweezy v. New Hampshire,* 345 U.S. at 249-50 (plurality opinion of Warren, J.).

In enjoining Rutgers' assessment of the fee payable to NJPIRG, the majority below overstepped the narrow bounds drawn by this Court for judicial review of academic judgments. There is no serious dispute that Rutgers' faculty and administration carefully exercised their professional, academic judgments in formulating the fee policy that is under attack in this case. The record is clear and undisputed on this point. After extensive deliberations involving faculty, administrators and students, Rutgers reached the decision to create a neutral funding policy — not just for NJPIRG — but for any organization that could demonstrate (1) broad student support and (2) a substantial contribution to the educational mission of the university. Nor can there be any claim that Rutgers' policy is at variance with "accepted academic norms," since the record in this case makes plain that several other leading state universities have reached the same educational judgment as Rutgers. *See* App. at 97a-99a. *Amicus* submits that the failure of the majority below to recognize and apply the standards of judicial restraint applicable to this case is more than ample reason for plenary review.

B. The Lower Court's Decision Impermissibly Curtails a University's Discretion in Funding Student Groups and in Encouraging Diversity Among Those Groups

This case graphically illustrates the pitfalls which courts encounter when they attempt to second-guess educational judgments. The majority below enjoined Rutgers' neutral

funding of NJPIRG based upon the Court's assessment of the organization's educational benefits as merely "incidental" to its "frankly ideological bent." App. at 13a. This conclusion was based upon the judgment that "PIRG's efforts are primarily devoted to changing conditions outside the University . . . [and] [w]hile such matters may affect the general public, those causes are not particularly germane to students of the University qua students." App. at 12a. Supplanting Rutgers' judgment with its own regarding an organization's capacity to contribute to the educational mission of the university, the majority discounted those groups with political or ideological objectives.

In *amicus'* view, the lower court adopted a particularly parochial approach toward education. The majority assumed that the only groups which can both take public policy stances and substantially contribute to a school's educational mission are student service organizations. This position ignores the crucial leadership, organizational, and communications skills offered by entities involved in the dynamics of public events outside of the controlled university environment. Exercising their professional judgment as educators, Association members have encouraged students to round out their academic training through supervised off-campus internships involving areas of public concern.

While tacitly recognizing the educational benefit of internship programs, the majority below concluded that this value substantially diminishes when the sponsor of the internship promotes ideological objectives. According to the court, this diminution is so substantial that state university support of the sponsor loses its constitutional protection and, in fact, becomes unconstitutional. Despite this harsh result, the lower court offered no guidance to educational institutions in their newly imposed mission of determining whether, and to what extent, student groups espouse an

ideology. As a result, the majority below placed state-run universities in the role of censor, picking and choosing among student groups on the basis of their message. As Judge Adams noted in his dissent, this is precisely the role state universities are barred from assuming by the First Amendment. App. 26a, 38a. *See also Widmar v. Vincent,* 454 U.S. at 277; *Healy v. James,* 408 U.S. at 188-89.

The majority's misconception of a university's role in determining whether to support student groups – which is the core of its decision – carries serious consequences. Under the decision, any time a state university decides to support a student organization – with funding, meeting space, or anything else of value – the university exposes itself to litigation under the civil rights laws by students with different points of view. Thus, the decision below, if allowed to stand, compels a university to choose between two equally unattractive alternatives.

On the one hand, the university can play the role contemplated by the majority and effectively censor student groups – limiting the university's forum to those few groups which take no positions on political or otherwise controversial issues. We submit that such a result, which would transform campuses into sterile, isolated ivory towers, is antithetical to the basic mission of a university – exposure to diverse views. On the other hand, the university can continue to encourage a diverse forum, but, under the analysis of the decision below, be subject to lawsuits brought by students who disagree with the policies espoused by any student organization the university in some form supports. Neither of these results, we submit, is consistent with fundamental notions of academic freedom, much less compelled by the First Amendment. Because the decision below thrusts state-supported academic institutions into this thicket, we urge the Court to grant the peti-

tion for certiorari submitted by Rutgers and set this case down for briefing and argument.

CONCLUSION

For the reasons set forth above, the Court should grant Rutgers' petition and issue a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Third Circuit.

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February 1986

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Auburn University
Bowling Green State University
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Clemson University
College of the Virgin Islands
Colorado State University
Colorado State University, Boulder
Connecticut Agricultural Experiment Station
Cornell University
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Florida State University
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Georgia Institute of Technology
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